Supreme Court, U.S.
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No._____

IN THE
UNITED STATES SUPREME COURT

JASUBHAI DESAI and STEPHEN ADAMS
Petitioners,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for Certiorari to
The Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT AND ADOPTING A NEW LEGAL TEST THAT EFFECTIVELY PRECLUDES A DUE PROCESS CHALLENGE TO OPPRESSIVE PRE-ARREST DELAY?

II. WHETHER THE TWELVE YEAR DELAY IN TRYING ADAMS VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE MOTIVE FOR THE DELAY, THE ADMISSION OF HEARSAY EVIDENCE AGAINST HIS CO-DEFENDANT DR. DESAI, IN NO WAY AFFECTED THE GOVERNMENT'S CASE AGAINST ADAMS?

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, Petitioners make the following disclosure: the caption of the case contains a complete list of all of the parties to the proceeding in the court whose judgment is sought to be reviewed and none of the parties is a corporation and there are no parent or subsidiary companies involved.

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OPINIONS AND ORDERS OF LOWER COURTS

On March 21, 1997, Judge Karen Fort-Hood of the Recorder's Court of the City of Detroit (Recorder's Court has since been incorporated into the Wayne County Circuit Court) issued a written Opinion and Order granting the Motions to Dismiss filed by both co-Defendants Dr. Desai and Adams. *See* App. 1-a. The Government subsequently filed a Claim of Appeal of right with the Michigan Court of Appeals on April 9, 1997.

On October 9, 1998, the Court of Appeals issued an Opinion and Order reversing the Trial Court's dismissal of the charges against Dr. Desai and Adams and remanded the case for further proceedings consistent with its opinion. *See* App. 6-a.

Dr. Desai and Adams filed timely Applications for Leave to Appeal with the Michigan Supreme Court. On November 2, 1999, the Michigan Supreme Court entered separate Orders denying the applications for leave to appeal of both Dr. Desai and Adams. *See* App. 26-a, 27-a.

STATEMENT OF THE BASIS OF JURISDICTION

This Court's jurisdiction is invoked by Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 2101. Petitioners seek review of the Michigan Court of Appeals decision in *People v. Adams, People v. Desai* (*consolidated*), 232 Mich. App. 128; 591 N.W.2d 44 (1998). This Court should treat the decision of the Michigan Court of Appeals as a judgment by the highest court of the state in which decision could be had pursuant to 28 U.S.C. § 1257, because review of its judgment, which was sought by both Dr. Desai and Adams by means of an Application for Leave to Appeal to the Michigan Supreme Court, was denied by the Michigan Supreme Court. *See* App. 26-a, Order Denying Dr. Desai's Application for Leave to Appeal; App. 27-a Order Denying Adams' Application for Leave to Appeal; *American R. Express Co. v. Levee*, 263 U.S. 19, 68 L. Ed. 140, 44 S. Ct. 11 (1923).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Petitioners seek the review of this Court, because their petition involves important questions of federal law, including the Due Process Clause of the Fifth and Fourteenth Amendments, set out verbatim below.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
> U.S. CONST. amend. V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks reversal of the Michigan Court of Appeals reversal of the Trial Court's dismissal of the murder charges brought against Dr. Desai and Stephan Adams.

In April 1995, Dr. Jasubhai Desai was charged with first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), and solicitation of first-degree murder, MCL 750.157b; MSA 28.354(2) by a complaint and warrant filed in Wayne County, Michigan. The charges arose out of the homicide of Anna Marie Turetsky in November 1983, nearly twelve years prior.

Dr. Desai and Turetsky had been business partners in the Kingsway Medical Clinic in Trenton, Michigan. On November 7, 1983, after being missing for several days, Turetsky's corpse was discovered in a parked car in a motel parking lot. Turetsky's cause of death was determined by the medical examiner to be manual strangulation.

At Dr. Desai's preliminary examination in 33rd District Court, the Government advanced its theory that Dr. Desai had hired Adams, a Kingsway Medical Clinic employee, to murder Turetsky, so that he could collect the proceeds of the life insurance policy of his business partner. The Government theory relied on the testimony of two principal witnesses: Kathleen Ann Caurdy--Turetsky's daughter and Lawrence Gorski.

The key to the Government's case was Gorski's hearsay testimony that Adams, a high school acquaintance of Gorski, had allegedly confessed to him that he had murdered Turetsky at the behest of Dr. Desai, while the two stood in adjoining stalls in a bar restroom. What also developed during the preliminary exam testimony was a plot involving Gorski and Lobdell to extort Dr. Desai and collect the reward money posted by Turetsky's father—Peter Slywka. Lobdell had contacted Turetsky's family hinting that he had information concerning Turetsky's murderer. The Turetsky family responded in kind: Slywka increased his earlier

reward from $10,000 to $150,000 and Caurdy became actively involved in the scheme. Lobdell and Caurdy admitted to being present in an incident where Adams was drugged, stripped and beaten in an attempt to solicit a confession implicating Dr. Desai. Lobdell claimed that a book, *The Anarchist's Cookbook*, with underlined portions on strangulation methods, was recovered from Adams' car that night that further linked him to Turetsky's murder. Lobdell and Gorski also testified that they had made audio tape recordings of a number of conversations with Adams and Dr. Desai concerning Turetsky's murder. After Turetsky's car had been thoroughly searched by the police and returned to the family, Turetsky's son Daniel claimed he found a tissue in his mother's car that had "SA" written on it. All of this evidence had been turned over to the Woodhaven Police. At the time of the preliminary examination, however none of this evidence could be located by the Government nor has any of it subsequently surfaced. At the preliminary examination, the only physical evidence introduced by the Government was a pay check in the amount of $2,018.00 from the Kingsway Medical Clinic payable to Adams, an employee at the time, which the Government claimed was the "pay-off" for Turetsky's murder.

Despite the weak evidence against Dr. Desai, the case against him was bound-over to Recorder's Court for trial and consolidated with the previously bound-over case against Adams. Adams had been charged with First Degree Murder and Conspiracy to Commit Murder in March, 1995.

On April 25, 1995, Adams filed a Motion to Dismiss for Undue Delay and Prejudicial Loss of Evidence. In his motion, Adams claimed that due to the nearly twelve year delay by the Government he suffered substantial prejudiced because: (a) the independent examination of allegedly inculpatory physical evidence, which was lost or destroyed, was impossible, (b) the independent examination of possible exculpatory physical evidence, which was lost or destroyed, was impossible, (c) the use of testimony of exculpatory and alibi witnesses, now unavailable due to disappearance, death or poor memory, was impossible and (d) the investigation of possible exculpatory investigative leads, which was lost due to time, was impossible. Adams asserted that

there was no legitimate reason for the Government's delay in arresting and charging Adams.

On October 6, 1995, Dr. Desai filed a similar Motion to Dismiss, citing substantial prejudice due to loss of physical evidence, witnesses and investigative opportunities caused by an sinisterly motivated delay by the Government that violated Dr. Desai's due process right to a fair trial. Dr. Desai also filed a Motion to Quash the information on the grounds that absent the hearsay testimony of Gorski, that was erroneously admitted at the preliminary exam under the penal interest exception, the Government failed to produce sufficient evidence to justify the bind-over.

The Trial Court consolidated Defendant's Motions to Dismiss. The heart of Defendants' consolidated motions was that they had suffered actual and substantial prejudice due to the Government's nearly twelve (12) year delay between Turetsky's homicide in November, 1983 and the issuance of charges against Defendants in the Spring of 1995, due to an unprecedented loss or unavailability of: (a) physical evidence, (c) witnesses and (c) investigative opportunities, related to Turetsky's murder. Defendants asserted that the unreasonable delay was due to an improper intentional effort by the Government to gain a tactical advantage, rather than some legitimate motive such as an ongoing investigation. In addition, Defendants alleged that the substantial amount of physical evidence and investigative leads lost in the past twelve years was a direct result of the inexcusably lax actions and procedures of the police agencies involved in the case.

Judge Karen Fort-Hood heard oral argument on the Motions to Dismiss beginning on October 13, 1995. The Trial Court conducted an evidentiary hearing to make a factual finding regarding: (a) prejudice to defendants and (b) reason for delay, pursuant to the two part test for pre-arrest delay set forth in *People v. White*, 208 Mich. App. 126, 136; 527 NW2d 34 (1994). Defendants called the following witnesses pursuant to the following schedule:

March 15, 1996	Woodhaven P.D. Sgt. James Osborn and former Woodhaven P.D. Lt. David Hesburn

June 21, 1996	Lt. Hesburn, continued.
September 12, 1996	Wayne County Investigator George Smedley Wayne County
September 12, 1996 continued	Assistant Prosecutor Nancy Alberts Michigan State Police Lt. Steve Robinson
November 1, 1996	Expert Witness Moses Skelton, former Detroit P.D. homicide investigator.

Moses Skelton, called by Defendants as an expert witness, testified that the loss of evidence and investigative opportunities were the result of gross negligence of the original investigation and undue delay by the Government. Sgt. Osborn was employed as a Woodhaven patrolman at the time of Turetsky's death in 1983. He was later designated officer in charge of the file. Smedley is the current custodian of evidence relating to Turetsky's homicide. He was called to establish that no new evidence was collected in this case since 1984 and no new leads were considered or followed in that time. Trooper Robinson was assigned to the one-man grand jury that investigated this case in 1994-95. He testified that significant leads were not followed and that no new evidence was presented to the one-man grand jury.

Assistant Prosecutor Alberts, the primary trial counsel for the Government was called to develop the reasons for delay in charging Dr. Desai and Adams. She admitted that the charges against Dr. Desai could not have been brought until the *Poole* decision. At the preliminary examination, the Government claimed that due to the recent decision in *People v. Poole*, 444 Mich 151 (1993), Gorksi's hearsay testimony about Adams' alleged implication of Dr. Desai, was now admissible against Dr. Desai under the statement against penal interest exception of MRE 804(b)(3). Assistant Prosecutor Alberts admitted that the Government gained a tactical advantage by delaying to bring charges until after the *Poole* decision, because it allowed the joint trial of Dr. Desai and Adams.

In addition to the testimony at the Evidentiary Hearing, counsel agreed to a Stipulation of Facts, which was entered into the trial record. The stipulation acknowledged that in the nearly

twelve year delay no less than seven (8) principal witnesses are dead or otherwise unavailable: Philip Hatcher, Jintendra Surti, Thomas McCrary, Detective Sergeant James Johnson, Peter Slywka, Dr. Ruth Huggins, Dr. Gregory Kaufman and Michael Baran.

Hatcher was the insurance agent who worked with Dr. Desai and Turetsky to arrange insurance policies, wherein each business partner was insured as the beneficiary upon the death of the other. The Government maintains that Dr. Desai had Turetsky killed for the proceeds of the life insurance policy. Defense maintains that the structure of the life insurance policies was Hatcher's suggestion. Hatcher died on March 12, 1988.

Surti was a bookkeeper for both Dr. Desai and Turetsky and the custodian of the records of the Kingsway Clinic. Defense maintains that a prime suspect for the murder was Charles Schochow, Turetsky's fiancee. Shortly before her murder, Turetsky was reportedly upset that Schochow was mismanaging a bar business that she had financed. As Turetsky's accountant, Surti could have provided invaluable incite into the finances of the bar business and Turetsky's state of mind. In addition, Surti could have provided an exculpatory explanation of the "pay-off" check to Adams from the Kingsway Clinic. Surti was not interviewed between November1983 and his death in March 1995.

McCrary, negotiated the Kingsway Clinic corporate check to Stephan Adams in the amount of $2,018.00 on April 19, 1984 which the Government characterizes as the "pay-off" check from Dr. Desai to Adams for the murder of Turetsky. The reality is the check was not for hired murder, but instead was compensation for Adams' work at the clinic. McCrary is also reported to have had a romantic relationship with Turetsky. The romantic history with Turetsky in combination with his known mental illness make McCrary another strong potential suspect in Turetsky's homicide. McCrary committed suicide on March 17, 1987.

Detective Johnson, was a Woodhaven P.D. crime scene investigator and the primary investigator of Turetsky's homicide from 1983-84. He had custody of a large amount of physical

evidence that has subsequently disappeared from the Woodhaven P.D. He died in 1985.

Slywka, Turetsky's father, initially offered a reward of *$10,000 for the discovery of his daughter's killer and later* increased the reward to $150,000 after discussions with Richard Lobdell. Slwka died on May 25, 1987.

Dr. Higgins, McCrary's employer at the V.A. Hospital, was a psychiatrist who was familiar with McCrary's psychiatric problems. She could have provided expert testimony about McCrary's mental illness, his history of psychiatric treatment, his feelings towards Turetsky and his violent tendencies. She died on January 28, 1995.

Dr. Kauffman was the medical examiner who performed the autopsy on Turetsky in 1983. Unfortunately, many key observations of the corpse were not documented by Dr. Kauffman in the autopsy report

Baran participated with Gorski, Lobdell and Kathy Caurdy, Turetsky's daughter, in the plot to extort Dr. Desai and collect the reward posted by Slwyka. Baran engaged in the 1984 incident wherein Adams was drugged and stripped in an attempt to force a confession and when the *Anarchist Cookbook*, purportedly implicating Adams, was allegedly found in Adams car. Baran's unavailability hinder Defendants' ability to establish that they were they victims of a real plot involving extortion and manufacturing evidence.

In addition, neither the Government nor Defendants could locate Sandra Kowalski or Jack Esper. Kowalski was the female friend of Sidhu and was sharing a room with him at the same motel where Turetsky's body was found. Esper was a high school friend of Gorski, whom Gorski has implicated in criminal schemes. Esper refuses to be interviewed or cooperate at this late date.

The Stipulation of Facts also noted that the following physical evidence is unavailable for review by Defendants: (a) audio tape recordings of conversations involving Lobdell, Gorski, Caurdy, Dr. Desai and Adams, (b) *Anarchist Cookbook* allegedly found in

Adams' car and (c) tissue with the initials "SA" allegedly found in Turtesky's car.

In March, 1997 in a written opinion, the Trial Court granted both Defendant's Motions to Dismiss. *See* App. 1-a. The Trial Court held that Dr. Desai and Adams had satisfied both prongs of *People v. White* by showing: (a) that they were prejudiced by the twelve year pre-arrest delay and (b) the delay by the Government was improper, because it was due to an attempt to gain a tactical advantage. The Trial Court noted that Defendants were prejudiced by the delay due to the fact that: (a) seven witnesses had died (Detective Johnson, Surti, Hatcher, McCrary, Slywka, Dr. Higgins and Raines), (b) three witnesses were missing (Dr. Kauffman, Baran and Kowalski) and (c) physical evidence had been lost or missing (the audio tape recordings of conversations involving: Lobdell, Adams, Gorski and Dr. Desai; the tissue paper with the initials "SA" written on it and the *Anarchist's Cookbook*). The Trial Court concluded " the reasons for the delay, on balance, do not justify the undue prejudice to the defendant's right to a fair trial." *See* App. 4-a. The Trial Court declined to decide Dr. Desai's Motion to Quash, because it had granted his Motion to Dismiss.

The Government filed an Appeal of Right with the Michigan Court of Appeals seeking the reversal of the Trial Court's order.

The Court of Appeals reversed the Trial Court. *See* App. 6-a, *People v. Adams, People v. Desai (consolidated)*, 232 Mich. App. 128, 591 NW2d 44 (1998). In its analysis, the Court noted that the leading Michigan case regarding a defendant's due process rights pre-arrest delay is *People v. Bisard*, 114 Mich. App. 784; 319 NW2d 670 (1982). The Court however disregarded the holding in *Bisard* and adopted a new test that dramatically increased the burden placed on a defendant: "Pursuant to the requisite two-part inquiry, a defendant must initially demonstrate 'actual and substantial' prejudice to his right to a fair trial." *Id.* at 134. Not surprisingly the Court, having precipitously raised the burden, concluded that Defendants had not demonstrated the requisite actual and substantial prejudice. The Court capriciously concluded "the missing evidence was the prosecutor's loss and

defendants' gain." *Id.* at 138. The Court held that the Trial Court had abused its discretion in granting Defendants' Motions to Dismiss. *Id.* at 139. The Court went on to address the reason for delay, the second prong of the *Bisard* test and stated, "[o]n the record, we find no deliberate tactical delay by the prosecution and hold that the Trial Court clearly erred in its finding to the contrary." *Id.* at 144.

Dr. Desai and Adams both filed Applications for Leave to Appeal to the Michigan Supreme Court. In his application for leave to appeal Dr. Desai pled that the Court of Appeals clearly erred: (a) by substituting its own judgment for the Trial Court's findings of fact, (b) by not remanding the case to the Trial Court pursuant to MCR 6.403 if it had found the fact finding inadequate, (c) in misapplying *Bisard* and creating a novel and impossible standard for Defendants to show prejudice. Adams' application raised similar issues of law. The Michigan Supreme Court denied the Applications for Leave to Appeal of both Dr. Desai and Adams.

Dr. Desai and Adams now file this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

I. THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT AND ADOPTING A NEW LEGAL TEST THAT EFFECTIVELY PRECLUDES A DUE PROCESS CHALLENGE TO OPPRESSIVE PRE-ARREST DELAY.

A. *In* Lovasco, *this Court expressly invited defendants to petition this Court to determine the role that the Due Process Clause plays in protecting against oppressive pre-arrest delay .*

In *U.S. v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044 (1977), this Court held that the Due Process Clause does afford a defendant some protection against oppressive pre-arrest delay. *Id.*

at 789. While the Court held that the lower courts had not erred in dismissing the indictment against *Lovasco*, it stated a future case with more compelling facts, would be necessary to fully explore the role of the Due Process Clause:

> In *Marion* we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. 404 U.S., at 324, 92 S.Ct., at 465. More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, that task of applying the settled principles of due process that we have discussed to the particular circumstances of the cases. *Id.* at 796, 2052.

The Court's language in *Lovasco* was an express invitation for defendants to petition this Court, if their pre-arrest delay was the result of an illegitimate motive by the government. In footnote 19, the Court alluded to sinister non-investigative reasons for pre-arrest delay including a "desire to postpone the beginning of defense investigation, or the wish to hold a 'club' over the defendant" which would provide compelling facts for a due process challenge. Since *Lovasco*, this Court has apparently not been presented with a case in controversy that presented compelling facts wherein oppressive pre-arrest delay would justify dismissal of the charges against Defendant. This case is ripe for this Court to finally determine what protection the Due Process Clause affords to defendants when the government has delayed bringing charges in an intentional and malign attempt to gain a tactical advantage. Petitioners ask this Court to affirm the Trial Court's decision that: (a) Dr. Desai and Adams had suffered actual and substantial prejudice due to the 12 year delay (b) the Government's delay was due to an intentional and malign attempt to gain a tactical advantage over Defendants and (c) the prejudice suffered and the reason for the delay violated Defendants' due process right to a fair trial and justifies dismissal of the charges against Defendants.

B. The Trial Court correctly dismissed the charges against Petitioners, finding that they had been denied their due process right to a fair trial, because of the loss of testimonial and physical evidence during the twelve year tactical delay by the Government.

The Trial Court correctly determined that both defendants' right to a fair trial were violated by the loss of testimonial and physical evidence during the twelve year tactical delay by the Government. The Trial Court stated that the loss of testimonial and physical evidence denied both Defendants their right to cross-examine and impeach key prosecution witnesses—essential elements of a defendant's Constitutional right to a fair trial. The Trial Court noted that the delay deprived Defendants of these powerful tools and seriously impaired their ability to present a defense.

i. Unavailable Witnesses

During the nearly twelve year delay seven material witnesses have died and four others are missing. Their unavailability to Defendants eliminates the possibility of gathering and presenting exculpatory evidence or impeaching government witnesses--all essential elements to a fair trial.

1. Philip Hatcher

Philip Hatcher died in 1988. Hatcher was the insurance agent who arranged the life insurance coverage of $1,450,000.00 on Turetsky's life for the redemption of her stock in the clinic, which the Prosecutor alleges was the motive for Dr. Desai to kill her. Because Hatcher is deceased, there is no witness available to testify that it was Hatcher's idea to arrange the policy on Turetsky with Dr. Desai as the beneficiary. This testimony is crucial to impeaching the Government's theory that Dr. Desai premeditated the murder of Turetsky by arranging for the life insurance policy on Turetsky and then subsequently ordering her murder for profit. The Government's theory will go unrebutted at trial, because there is no admissible or alternative evidence available to establish Hatcher's role in the insurance policy.

2. Jintendra Surti

Jintendra Surti died on March 20, 1995. Surti was the bookkeeper for Dr. Desai, Turetsky and the Kingsway Medical Clinic that they co-owned. Incidentally, Surti was also the bookkeeper for a bar business that Turetsky co-owned with her fiancee Charles Schochow. Surti was the last acquaintance of Turetsky to see her alive. He could have testified about her mood just prior to her death and possibly to her unknown destination after she left him. Turetsky's son testified that on the night before she disappeared, November 2, 1983, Turetsky slapped Schochow in a restaurant. Surti could testify as to how Turetsky was upset by Schochow's poor management of the bar business. Schochow is a prime suspect in the murder that was never fully investigated by the police, which is treated in greater detail below. Surti could have provided objective testimony regarding Schochow's motive to kill Turetsky. With Surti and Turetsky both deceased, the defense is left only with the self-serving testimony of Schochow assuming he does not exercise his Fifth Amendment privilege against self-incrimination.

3. Thomas McCrary

Thomas McCrary was a physician's assistant who worked at the medical clinic co-owned by Dr. Desai and Turetsky. The record shows that McCrary: (a) dated Turetsky, (b) suffered from serious psychiatric problems and (c) committed suicide in 1987. McCrary is another strong suspect in Turetsky's homicide due to his romantic history with Turetsky and his psychiatric problems. Furthermore, McCrary's suicide could have been an act of contrition for his murder of Turetsky or an act of fear from prosecution and imprisonment. McCrary's death eliminates Defendant's ability to inculpate him in the homicide and thus exculpate Dr. Desai and Adams.

In addition, McCrary was to be a key witness in the Government's theory of Turetsky's murder. The Government maintains that Dr. Desai hired Adams to kill Turetsky and paid him with a $2,018.00 check from the Kingsway Medical Clinic. McCrary negotiated the check for $2,018.00 from the medical clinic to Adams in 1984. Adams is not available to Dr. Desai because of he has asserted his Fifth Amendment privilege against

self-incrimination. McCrary's testimony would have substantiated Dr. Desai's assertion that the check was for legitimate purpose, namely compensation for work at the clinic. No substitute evidence is available to contradict the Government's theory for the check.

4. Detective James Johnson

Detective Johnson died in 1985. He was the officer in charge of the homicide investigation from the day Turetsky's corpse was discovered. He was also in charge of the subsequent gathering of evidence. As the officer in charge he was also responsible for the custody of the physical evidence. Detective Hesburn and then-Officer Osborne testified that they do not know the whereabouts of the physical evidence entrusted to Johnson that has subsequently disappeared, including: audio tapes of conversations involving Gorski, Dr. Desai, Adams and Lobdell, *Anarchist Cookbook* and Tissue with initials "SA." The tapes document the attempt by Gorski and Lobdell to extort Dr. Desai. Detective Hesburn has admitted that he cannot remember the contents of the conversation on the tapes. With the disappearance of the tapes and the lack of available witnesses to their content, there is no alternative evidence available to Dr. Desai and Adams to demonstrate that they had maintained their innocence despite the violent extortion attempt by Gorski, Lobdell and others. The extortionists certainly will not testify to their own unlawful conduct.

5. Peter Slywka

Slywka, Turetsky's father, died on May 25, 1987. Slywka offered the initial reward of $10,000.00 for the identity of his daughter's killer that Lobdell later persuaded him to increase to $150,000.00. Lobdell regularly fed Slywka and other Turetsky family members information about his attempts to elicit a confession from Adams. Slywka could have testified that he too was a victim of the extortionate schemes of Gorski and Lobdell. Slywka would have exposed that the Government's star witness, Gorski, was eager to profit from Turetsky's death, regardless of the truth. This testimony would have been critical to exculpating Dr. Desai, because the Government's case against Dr. Desai has been reduced to Gorski's hearsay statement of Adams alleged confession. No other witness is available to testify as to the rationale for Slywka's dramatic increase in the reward.

6. Dr. Gregory R. Kauffman

Dr. Kauffman, the pathologist who performed the autopsy on Turetsky, cannot be located. Dr. Laning Davison, testified at the preliminary examination by interpreting Dr. Kauffman's autopsy report. Dr. Davison admitted that he could not testify whether a person of Adam's size, weight, and physical condition could have alone killed Turetsky by manual strangulation. The autopsy report is no substitute for Dr. Kauffman's first hand knowledge of the corpse. Defendants intended to probe Dr. Kauffman regarding: the size of the markings on the body, the details of the strangulation markings, whether hair or other body scrapings were present on the victim, the likely position of the murderer and the victim, the amount of time the killing took – all potentially exculpatory evidence that is not contained in the autopsy report and cannot be determined by a non-examining pathologist.

7. Dr. Ruth Higgins

Dr. Higgins was a psychiatrist employed by the Veteran's Hospital in Allen Park, MI. Dr. Huggins was McCrary's treating psychiatrist. She died on January 28, 1995. She could have testified about McCrary's capacity for violent behavior, including potential homicidal tendencies and the his romantic history with Turetsky. No alternative evidence is available to substitute for Dr. Higgins' testimony.

8. Michael Baran

Michael Baran is missing. Baran claimed to have discovered a duffel bag in Adams' car, that allegedly contained a book, *The Anarchist's Cookbook*, which contained underlined text on strangulation techniques. Strangely this book, which purportedly implicates Adams, has since disappeared from police custody. Baran was a co-conspirator in the extortion plot against Defendants. The disappearance of the book and Baran, prevents Defendants from independent examination of the book for fingerprints, cross-examining or impeaching Baran and implicating Baran with perjury, extortion and manufacturing evidence. There is no alternative available source for Dr. Desai or Adams to demonstrate that Baran is a liar who has manufactured evidence in this case. Furthermore, there is no available source for Defendants to show that neither admitted to killing Turetsky, even when

Adams was subject to a cruel and brutal interrogation by Baran, Lobdell and Caurdy.

9. Sandy Kowalski

Kowalski was the female friend of Sidhu, with whom she was sharing a room at the motel, near where Turetsky's corpse was discovered. Kowalski and the other motel guests were never interviewed by the police. Kowalski and the other motel guests could have provided exculpatory testimony in that at the motel on the night of the murder: (a) they did not see either Dr. Desai or Adams, or anyone fitting their description or (b) they did see Schochow or McCrary, or someone fitting the description of other suspects. Perhaps more importantly, Sidhu was the only person known to have been near the motel on the night of the murder who actually knew Turetsky. It is conceivable that she could inculpate Sidhu by testifying that Sidhu had left the motel room briefly and returned agitated, disheveled and bloody.

10. Jack Esper

Jack Esper was a high school friend of Gorski's whom Gorski has implicated in other criminal conspiracies. Esper could be a key witness in developing Gorski's scheme to extort Dr. Desai, by means of extracting a false confession from Adams. Esper refuses to be interviewed at this late date.

ii. Lost Physical Evidence

In the years since Turetsky's murder, a disturbing amount of evidence collected by the police involving her homicide has disappeared from the custody of the Woodhaven P.D.

1. Audio Tape Recordings of Telephone Conversations

According to Lobdell's preliminary exam testimony, he recorded between fifteen and twenty conversations on four tapes, involving himself, Adams, Gorski and Dr. Desai, which he turned over to the custody of the now deceased Detective Johnson. Although Lobdell claims that it was initially Gorski's idea to extort Dr. Desai, he admits to acting with Caurdy and Baran to force a "confession" out of Adams to either extort Dr. Desai or to receive the reward money from Turetsky's father. Together with Caurdy and Baran, Lobdell arranged one or two telephone conversations with Dr. Desai that he recorded. These tapes were listened to by

Hesburn but were never transcribed. These tapes have either been lost or destroyed, precluding their analysis or review by Defendants or an independent source. Hesburn has no reasonable recollection of the dialogue on the tapes. These tapes could have provided crucial exculpatory material to the defense.

2. *Audio Tape Recordings of the April 1984 Assault on Adams*

According to Lobdell's preliminary examination testimony he, Caurdy and Baran, in a planned scheme, lured Adams to a motel room in an attempt to force a confession out of him. They proceeded to strip Adams of his clothes and physically assault him. Contemporaneously, the events in the motel room were being tape-recorded. That tape was turned over to Detective Johnson, but has since disappeared. It is important to note that despite the extreme duress Adams did not confess to involvement in the homicide. A tape recording of Adams professing his innocence under such brutal conditions would have been invaluable exculpatory evidence for both Defendants.

3. *The Tissue Paper*

Daniel Turetsky claimed that he found a tissue paper with the initials "SA" written on it in Turetsky's car after the police had thoroughly searched it. Many Turetsky family members claimed to have seen the tissue and claim that it was turned over to the Woodhaven P.D. This tissue has since disappeared from police custody. Examination of this tissue by Defendants would substantiate their assertion that members of the Turetsky family were actively engaged in the extortion plot, to the extent of manufacturing evidence against Defendants.

4. *Anarchist Cookbook*

The *Anarchist Cookbook* allegedly found in Adam's car by Baran during the April 1984 assault/interrogation and turned over to the Woodhaven Police Department has also disappeared from police custody. Defendants maintain that the *Anarchist Cookbook* and the "SA" tissue were items of manufactured evidence planted by either the extortionists and/or Turetsky family members. The extortionists, Gorski and Lobdell, baited the Turetsky family with false and exaggerated information in order to inflate the reward that they hoped to collect. Driven by the lies, half-truths and

exaggerations of Gorski and Lobdell the Turetsky family became convinced that Dr. Desai and Adams had killed Turetsky. It was the Turetsky family's misguided passion that caused the police to focus on Dr. Desai as the prime suspect, to the exclusion of several other strong suspects.

iii. Lost Investigative Opportunities

The Court of Appeals completely ignored this important aspect of the prejudice suffered by Defendants, namely the failure of the police to collect evidence relating to Turetsky's homicide, that exculpated Dr. Desai and Adams. The Court of Appeals opined that Defendants had not made specific references to specific instances of prejudice. This conclusion emphasizes the importance of the Trial Court in determining the value of live witnesses, such as the former homicide investigator Moses Skelton. It is difficult to imagine how a record could have established more specific references to the shocking and careless behavior of the investigating officers that squandered investigative opportunities that could have inculpated other suspects and exculpated Dr. Desai and Adams.

The contents of Turetsky's purse and car were never fumed for fingerprint analysis and the opportunity for effective fuming no longer exists. Although it appeared that Turetsky had engaged in a struggle, the responding officers did not bag her hands to preserve trace evidence of the assailant's blood or skin under her fingernails. In addition, none of the lost audio tapes, wherein Dr. Desai and Adams maintained their innocence despite duress from the extortionists, were ever transcribed by the Government. Employees and guests of the hotel near where Turetsky's body was found were not interviewed nor were their identities obtained. The motel registration signature cards were never retained for analysis.

Key suspects were never properly investigated. Shannon Schochow has never been interviewed. She is the current wife of Charles Schochow and was the girlfriend of Schochow in November 1983, when he was engaged to Turetsky. Her interrogation shortly after the homicide could have produced proof of Schochow's guilt.

Thomas McCrary was another suspect never properly investigated by the police. McCrary was never questioned by the police about his negotiation for the alleged "pay-off" check to Adams. McCrary, a former lover of Turetsky, committed suicide after her murder. Although his suicide could have been an act of remorse for murdering Turetsky, for some explained reason his suicide note was subsequently destroyed.

Gregory Kind was yet another suspect never properly investigated by the police. In November 1983, Kind was the boyfriend of Christine Turetsky, the twin sister of Caurdy and daughter of Anna Marie Turetsky. Just prior to Turetsky's murder, Kind viciously assaulted Caurdy. Kind, according to Smedley, was never investigated, clearly a lead too stale at this late date to investigate.

The Trial Court correctly found that the Government's reason for delay, in bringing the charges against the defendants was motivated by an intent to gain a tactical advantage. In support of its finding, the Trial Court noted that, "Assistant Prosecutor Nancy Alberts testified [at the evidentiary hearing] that it was to their advantage of they tried both defendants at one trial." *See* App. 3-a. The Trial Court further observed that, "[t]he tactical advantage of trying both defendants came as a result of waiting for the *Poole* decision, rather than the discovery of new evidence from an [ongoing] investigation." *See* App. 4-a.

The prosecutor and police knew as early as 1985 that a witness named Larry Gorski had testified to a federal grand jury in 1984 that Adams had allegedly admitted to Gorski that he had perpetrated a homicide at the request of Dr. Desai. In 1985, officers from the Woodhaven Police Department traveled to Chicago and interviewed Gorski. However, from 1985 through 1988 the record discloses no investigative activity on the Turetsky homicide.

In 1988 and 1989, the police investigated different leads relating to Gorski and even traveled to Denver to confront Adams. Detective Hesburn indicated that he submitted the file in approximately 1988 to the Wayne County Prosecutor's office. Obviously a delay of seven years occurred between the 1988

submission of the file to the Office of the Wayne County Prosecutor by Detective Hesburn and the issuance of the warrant in 1995.

In his testimony, Detective Hesburn indicated that he did not believe anything was done concerning investigating Adams as a suspect from the date of the submission of the file to the prosecutor's office and his retirement. The record shows that no investigative work was done from 1991 to 1994 either, which creates a 6-year gap after the brief period of investigation in 1988-1989. Thus, nearly seven years elapsed before the government charged Dr. Desai for the 1983 homicide, despite the fact no additional evidence was unearthed. Hence, the Trial Court's finding that the Government's claim of an investigative delay was merely a guise to cover its tactical maneuvering. The Government's inaction was unquestionably the decision of the Government to capitalize on an expected change in the law.

C. *The Michigan Court of Appeals has adopted a new test that condones improper acts by the government and effectively precludes a due process challenge to oppressive pre-arrest delay.*

The reality is that the new test created by the Court of Appeals precludes any constitutional challenges to oppressive pre-arrest delay by the government.

Prior to the Court of Appeals decision, the leading Michigan case on pre-arrest delay was *Bisard*. *Bisard* articulated the test for pre-arrest delay in light of this Court's *Lovasco* decision: [W]e hold that once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted." *Id.* at 791 (emphasis added). The *Bisard* court stated that, "a balancing test should be used in evaluating due process claims." *Id.* Incidentally, in *Bisard* the court remanded the case to the trial court stating, "Remand is particularly appropriate as the trial court alone had the opportunity to evaluate first hand the prejudice resulting to the defendant from the prosecutor's reasonable delay." *Id.* (emphasis added). Thus, *Bisard* established a balancing test wherein once the defendant showed

some prejudice due to a pre-arrest delay, the government had the burden of showing that the reason for delay justified the prejudice that the defendant had suffered. It is important to note that the *Bisard* court explicitly noted that the Trial Court is the most important determinant as to prejudice to the defendant.

The Court of Appeals so misinterpreted the *Bisard* decision that it in fact created a new test that places an impossible burden on a defendant claiming oppressive pre-arrest delay. The Court of Appeals has raised the initial burden upon a defendant of showing some prejudice to requiring them to "demonstrate 'actual and substantial' prejudice to his right to a fair trial." *Adams* at 134 (emphasis added). It is important to note that Judge Griffin acknowledged that the new test adopted by the Court of Appeals was "more precise than the standard the he articulated in *White*." *Id. See* Footnote 6.

The Court of Appeals' interpretation of the second prong of the *Bisard* test, the Government's reason for delay, is even more troubling. Although the Court of Appeals held that Defendants had not met the threshold of the first prong of the *Bisard* test, in its zeal the court went on to analyze the Government's reason for delay. The Court of Appeals stated that Assistant Prosecutor Alberts had "testified that the *Poole* hearsay problem was but one factor in the decision not to prosecute." *See* App. 18-a, 141 (emphasis added). This language implies that an improper motive by the Government is allowable if the Government's improper motives for delay are sufficiently diluted by "proper" reasons manufactured after the fact.

In its eagerness to overlook the sinister motives for delay by the government, the Court of Appeals decision invites the government to manufacture a profusion of "proper" motives to outweigh their sinister motive. The fundamental right to a fair trial protected by the Due Process Clause of the Fifth and Fourteenth Amendments was not meant to be so easily subverted.

In its interpretation of the Sixth Amendment right to a speedy trial, this Court has repeatedly stated that the showing of a bad-faith motive for delay should be weighed heavily against the government. *See Pollard v. United States*, 352 U.S. 354, 361, 77

S.Ct. 481, 485-486, 1 L.Ed.2d 393 (1957), *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 466, 30 L.Ed.2d (1971), *Barker v. Wingo*, 407 U.S. 514, 531, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), *Dogget v. United States*, 505 U.S. 647, 656, 112 S.Ct. 2686, 2693, 120 L.Ed.2d 520 (1992).

This Court should adopt a similar stance against improper motives by the government in cases of pre-arrest delay. In fact, this would resurrect the holding of the *Bisard* Court: "When a delay is deliberately undertaken to prejudice a defendant, little actual prejudice need be shown to establish a due process claim." *Bisard* at 790 (emphasis added). Implementing the ideals of Due Process Clause, presupposes the absence of the sinister manipulation of the criminal justice system by prosecutors and the police. When such action is shown, it should be severely penalized to maintain the integrity of the Constitution and the American criminal justice system.

The balancing test adopted by the Michigan Court of Appeals is a balancing test in name only. The test condones improper action by the government and places an impossibly high burden upon the defendant. If the instant facts failed to establish that the Defendants' due process right to a fair trial was violated, one cannot conceive of any of set of facts that would. This Court in *Lovasco* has stated in dicta that the Due Process Clause provides some protection against oppressive pre-arrest delay caused for "sinister" motives. This case presents a compelling set of facts ripe for adjudication by this Court wherein the protection provided by the Due Process Clause against sinister pre-arrest delay can finally be determined.

D. *This Court should peremptorily reverse the Court of Appeals, which clearly disregarded all standards of appellate review, in its reversal of the Trial Court.*

In its reversal of the Trial Court, the Court of Appeals incorrectly construed all inferences in favor of the appellant—the Government. "The unavailable individuals were prosecution witnesses, who it is reasonable to surmise, would have provided information valuable to the prosecution." *See* App. 13-a. Judges

Griffin, Gribbs and Talbot ignored the legal requirement that they construe all inferences in favor of the Trial Court's factual findings.

Regardless of what standard of review is applied, the question was not whether Judges Griffin, Gribbs and Talbot would have personally ruled differently from the Trial Court had any of them sat as the trial judge, but whether there was sufficient evidence to support the Trial Court's conclusion, construing all of the facts in favor of the Trial Court's ruling. This is so, regardless of what standard of review is applied. *See People v. Milbourn*, 435 Mich 630, 461 NW2d 1 (1990) (Boyle, J. dissenting) ("[s]urely a trial court exercising its discretion understands that its decisions must be founded on fact and rooted in reason; just as surely, it does not expect that appellate court review under any extant standard of abuse of discretion permits the appellate judge to re-characterize the facts or reject plausible inferences drawn from them."); *Sullivan v. Russell*, 417 Mich 398, 401 n. 4, 338 NW2d 181 (1983) (under clearly erroneous standard of review, "all reasonable inferences in favor of the Appellee); *City National Bank v. First National Bank*, 22 Ark App 5, 732 SW2d 489 (1987) (under de novo review, "[w]e review the evidence in the light most favorable to the Appellee, and indulge all reasonable inferences in favor of the decree"). In this case, the Trial Court listened to the evidence, carefully examined every aspect of the extensive record, and made detailed findings. The fact that Judges Griffin, Gribbs and Talbot may have ruled oppositely, if any of them had been the Trial Court is not the basis for casting its analysis aside. As the West Virginia Supreme Court has recognized:

> This Court reviews the factual finding under the clearly erroneous standard and, if it is supported by substantial evidence, we will not overturn that finding even though we would be inclined to make a different finding or draw a contrary inference on the same set of facts. *Mary Ann P. v. William R.P.* 197 W VA 1, 475 SE2d 1 (1996)

The Court of Appeals surreptitiously substituted its own judgment for the factual findings of the Trial Court, in disregard for all standards of appellate review. Clearly, Dr. Desai and Adams demonstrated that their due process right to a fair trial was

violated due to the prejudice they had suffered directly attributable to the sinister delay by the Government. This Court should peremptorily reverse the Court of Appeals, because it abused its role as an appellate court. In addition, this case presents unique and compelling facts, which the Trial Court recognized as meriting dismissal, that would give other courts guidance as to what circumstances constitute dismissal of charges on the grounds of unconstitutional pre-arrest delay.

II. WHETHER THE TWELVE YEAR DELAY IN TRYING ADAMS VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE MOTIVE FOR THE DELAY, THE ADMISSION OF HEARSAY EVIDENCE AGAINST HIS CO-DEFENDANT DR. DESAI, IN NO WAY AFFECTED THE GOVERNMENT'S CASE AGAINST ADAMS?

(This Issue Applies to Petitioner Adams Only)

While both Petitioners strongly believe that all the grounds for delay asserted by the Government were insufficient to justify a delay as to either Petitioner, Stephen Adams has one additional ground that is unique to him. All of the asserted grounds for the delay in this matter apply only to Dr. Desai.[1] While Adams

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[1]The Michigan Court of Appeals also states that Adams was missing, clearly at least a partial justification for a delay. However, while there may have been a time when the prosecution did not know the whereabouts of a person who had not been charged with any crime, he was never hiding and was found quickly when the prosecution wanted to question him (six years before the charges were brought). It should be noted that the prosecution never stated that Adams was missing, merely stating that investigators traveled to Phoenix Arizona and Denver Colorado in July of 1989 in a successful attempt to locate Mr. Adams, (Prosecutor' s Brief to the Court of Appeals, 3). It should also be noted that this brief' s further statement that Adams made inculpatory statements at his 1989 questioning was incorrect and was not argued by the prosecution at the trial level. In

appreciates the general societal interest in joint trials,[2] there comes a point in time where this interest standing alone should not be used to indefinitely postpone a criminal trial.

The Government has never asserted that Adam's claimed confession was not admissible against him under Michigan law. Further, such a contention would be unreasonable. Throughout the entire period these statements were admissible against Adams under MRE 801(d)(2). The Government's delay was motivated by the desire to admit these alleged statements against Dr. Desai.

While courts have recognized that while reasonable adjournments in order to effectuate a joint trial are permissible,[3]

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fact, Adams consented not only to being questioned, but also to taking a lie detector test. He denied involvement and passed the polygraph at that time. Furthermore, the prosecution has presented no evidence or even reason (other than Gorski' s failure to take a lie detector) for the delay between 1989 and 1995. Although a grand jury was convened in 1994 to look into unsolved murders, there is no evidence that any information not previously available to the prosecution was brought to light at that time. Gorski' s failure to take a lie detector test and Adams passing one certainly go the weight of evidence, but not to the amount of evidence available to the prosecution.

[2]*See, gen. United States v. Zaffiro*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (Joint trials "play a vital role in the criminal justice system." They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." For these reasons, we repeatedly have approved of joint trials) (citations omitted).

[3]In various places in this brief, Petitioner relies on cases interpreting the federal right to a speedy trial. For the most part, these citations are being applied by analogy since pre-arrest delay is a due process claim under federal law, rather than a speedy trial one. *See gen. United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed.2d 468 (1971) (On its face, the protection of the Amendment is activated only when a criminal prosecution has

there is a reasonable limitation on this principle.[4] In this case, the Government has not offered any reason to suggest why the delay against Petitioner Adams was reasonable and the Court of Appeals also failed to make this distinction. Instead, the Government treats the Co-Petitioners as one entity and assumes that any delay against Dr. Desai is also reasonable against Adams.

The position being advocated in this sub-issue (that there should be a reasonable limitation imposed with respect to the amount of time one case may be delayed to be tried with a co-defendant's case) is also in accord with firm public policy. If the government really believes that Adams was the trigger man in a murder-for-hire, what possible interest would it have in allowing such a person to walk the streets for more than ten years while it waits to build a better case against the Co-Petitioner? While the Petitioner concedes that reasonable delays attributable to the prosecution of a Co-petitioner should be considered in determining the reasonableness of the delay, the delay in this case was entirely attributable to the prosecution and entirely unreasonable as applied

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begun and extends only to those persons who have been 'accused' in the course of that prosecution).

[4]*See, e.g. Mullins v. State*, 608 P2d 764 (Alaska, 1980) (delay was unreasonable under state speedy trial act where the state delayed the Defendant' s trial in hopes that they would be able to get the Co-defendant to testify against the Defendant); *State v. Anthony*, 448 A2d 744 (1982) (twenty-eight month delay of trial was unreasonable where it was granted to accommodate schedule of co-defendant' s attorney); *Sanchez v. Superior Court of Los Angeles County*, 131 Cal App 3d 884, 182 Cal Rptr 703 (1982) (same); *State v. Faalafua*, 67 Haw 335, 686 P2d 826 (1984); *Cappetta v. State*, 471 So2d 1290 (Fla App, 1985) (delay unreasonable under state speedy trial act where delay was aimed at accommodating the desire of two co-defendants not to have case reassigned to a different judge); *United States v. Graham*, 128 F.3d 372 (CA 6, 1997) (eight year delay of trial while co-defendant was tried in state court for a related murder was unreasonable).

to Petitioner Adams. A twelve year delay of Adams's prosecution so that the Government can try to find additional evidence against Dr. Desai or pray for a change in the law is not reasonable. There are limits to how long one defendant's prosecution can be delayed while the police pursue charges against a co-defendant. As a Florida Court noted: at the convenience to the state of a joint trial is not an exceptional circumstance justifying an exception to the Petitioner's right to a speedy trial. *Rico v. State*, 463 So2d 1172, 1174 (Fla App 1984); *Faalafua, supra.*

In this case, Adams was forced to endure a massive delay, at the costs of lost evidence, unavailable witnesses, failed memories and lost investigative leads. Adams has demonstrated a serious impairment to his due process right to a fair trial and the Government has not come forward with any legitimate explanation that justifies the delay.

RELIEF

This Court should grant Petitioners a Writ of Certiorari and/or peremptorily reverse the opinion of the Michigan Court of Appeals.

Respectfully submitted,

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APPENDIX

State of Michigan
In The Recorder's Court of the City of Detroit

The People of the State of Michigan,
Plaintiff,

Jashubai Kesubai Desai and
Stephen Charles Adams,

Defendants.

Recorder's Court
Case No.s 95-7158
95-4495
Hon. Karen Fort Hood

/

OPINION

Defendants were charged in 1995 for the [sic] their alleged involvement in the November, 1983 death of Anna Marie Turetsky. Defendants have moved to dismiss the charges on the basis of prearrest delay. Defendant Desai has also filed a Motion to Quash. The Court heard oral argument on these Motions.

In determining whether dismissal is warranted by a 12 year delay, the defendants must show 1) substantial prejudice to their right to a fair trial, and 2) intent by the prosecution to gain a tactical advantage. **People v. White**, 208 Mich App 126, 136; 527 NW2d 34 (1994). Defendants meet both prongs of this test.

First, both defendants are prejudiced by the death of [*2] several key witnesses, n1 witnesses unable to be located n2 and by

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n1 The following witnesses are now deceased:

1. Detective Sgt. **James Johnson**, Woodhaven crime scene investigator and the preliminary investigator of this homicide during 1983-1984—died in 1985.

2. **Jintendra Surti**, bookkeeper for Dr. Desai and Anna Marie Turetsky, custodian of the clinic's records, which were subpoenaed by the grand jury, died during the state grand jury investigation on March 20, 1995.
3. **Phillip Hatcher**, insurance agent that worked with Dr. Desai and Anna Marie Turetsky to arrange insurance policies by which each were insured as beneficiaries upon the death of the other relating to Kingsway Clinic – died March 12, 1988.
4. **Thomas McCrary**, who negotiated the Kingsway Clinic check for Stephan Adams in the amount $2,018.00, said check dated April 19, 1984, which the prosecution has characterized as the "pay-off" check for the homicide—died March 17, 1987.
5. **Peter Slywka**, Anna Marie Turetsky's father, who offered a reward for the discover of the perpetrator of the homicide; and who had discussions with Richard Lobdell concerning the payment of reward monies, which according to Lobdell increased in amount from $10,000 to $150,000 as Lobdell advances his extortion activities—died May 25, 1987.
6. **Dr. Ruth Huggins**, McCrary's employer at the V.A. Hospital, a psychiatrist who was familiar with McCrary's psychiatric problems—died January 28, 1995.
7. **Frank Raines**, Gorski's associate, allegedly with Gorski in other criminal acts is now deceased.

n2 The following witnesses were missing:

1. **Dr. Gregory Kaufman**, the pathologist who did the original autopsy of the deceased is unavailable as he cannot be located.
2. **Michael Baran** has never been located and was central to the extortion of Adams, and attempted extortion of Dr. Desai.
3. **Sandy Kowalski** was the female friend of Mr. Sidhu and was sharing a room with him at the motel where the

body was found in November of 1983. The prosecutor states that she has now been located.

---------- End Footnotes ----------

[*3] lost or unavailable n3. The significance of this lost or unavailable evidence is that the defendants are deprived of a powerful tool in cross-examining and impeaching key prosecution witnesses. **People v. Albert**, 89 Mich 350, 354; 280 NW2d 323 (1979). Both defendants' constitutional right to confront and ability to present a defense have been seriously impaired. This loss of testimonial and physical evidence, over the past 12 years, prejudiced the defendants' right to a fair trial.

Second, the prosecutor intended to gain a tactical advantage over the defendants. Assistant Nancy Alberts testified that it was to their advantage if they tried both defendants at one trial, rather than separately. (Sept. 12, 1996 Hearing pp. 73-74). Furthermore, she was not satisfied with the

---------- Footnotes ----------

n3 The following evidence has been lost or destroyed:

1. The 1984 tape recording of conversations between Lobdell and Adams, Lobdell and Gorski, Lobdell and Dr. Desai.
2. The April, 1984 tape recording of an extortion attempt of Adams.
3. The tissue paper, with the initials "SA" written on it, found by the Turetsky family purported found in the deceased's vehicle.
4. The Anarchist's Cookbook, a book purportedly found in a duffle bag removed from Adams' car. The Anarchist's Cookbook contains passages relating to strangulation techniques.

---------- End Footnotes ----------

[*4] quality of evidence n4 against the defendants and decided not to prosecute. (Sept. 12, 1996 Hearing pp. 64 and 77-79). In sum, the prosecutor's office contends that the delay in prosecution of this case was due to the ongoing investigation. This is a legitimate reason for delay. **See People v. Betancourt**, 120 Mich App 58, 62; 327 NW2d 390 (1982).

However, a change in the law occurred permitting them to use Adams' alleged statement against Desai as well as himself. n5 The tactical advantage of trying both defendants together came as a result of waiting for the Poole decision, rather than the discovery of new evidence from an investigation. Thus, this Court finds that the prosecutor intended to wait for an anticipated change in the law, that was tactically advantageous to them in the prosecution of this case, under the guise of conducting an ongoing investigation.

While the court sympathizes with the prosecutor for the

---------- Footnotes ----------

n4 The evidence consisted of an alleged statement by Adams made to Gorski, implicating Adams and Desai. Prior to September, 1993, this alleged statement could only be introduced as an admission by a party opponent against Adams.

n5 After the Supreme Court decided **People v. Poole**, 444 Mich 107 (1993), on September 21, 1993, the alleged statement could be introduced against Desai as well as Adams.

---------- End Footnotes ----------

[*5] delay and the various police departments for the unavailability of evidence, the reasons for the delay, on balance, do not justify the undue prejudice to the defendants' right to a fair trial. Therefore, for the reasons

stated, this Court finds that the defendants' Motions to Dismiss the charges filed against them are **GRANTED**.

In light of this Court's decision on the Motions to Dismiss, this Court need not address Desai's Motion to Quash.

Dated: March 21, 1997

/s/ Hon. Karen Fort Hood
Recorder's Court Judge

ORDER

At a session of said court held in the Frank Murphy Hall of Justice on March 21, 1997

PRESENT: HONORABLE Hon. Karen Fort Hood
Recorder's Court Judge

In the above-entitled cause, for the reasons set forth in the forgoing Opinion;

IT IS HEREBY ORDERED that Defendant's Motions to Dismiss are **GRANTED**.

/s/ Karen Fort Hood
Recorder's Court Judge

*232 Mich. App. 128, *; 591 N.W.2d 44, **;*
*1998 Mich. App. LEXIS 271, ****

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v STEPHAN CHARLES ADAMS, Defendant-Appellee. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JASHUBAI KESHUBAI DESAI, Defendant-Appellee.

No. 202665, No. 202666

COURT OF APPEALS OF MICHIGAN

232 Mich. App. 128; 591 N.W.2d 44; 1998 Mich. App. LEXIS 271

June 17, 1998, Submitted
October 9, 1998, Decided

Recorder's Court LC No. 95-004495. Recorder's Court LC No. 95-007158.

JUDGES: Before: Griffin, P.J., and Gribbs and Talbot, JJ.

GRIFFIN, P.J.

In these consolidated appeals, the people appeal as of right an order of the Recorder's Court granting defendants' motions to dismiss charges of first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), and solicitation of first-degree murder, MCL 750.157b; MSA 28.354(2). We reverse and remand.

Defendants were charged in 1995 with the November 3, 1983, strangulation [***2] murder of Anna Marie Turetzky in Woodhaven, Michigan. Turetzky, defendant Desai's business partner in the operation of a medical clinic, was found dead in her automobile parked behind a local motel. Desai had allegedly solicited defendant Adams to commit the murder. Following separate preliminary examinations, defendants were bound over and their cases consolidated for

trial. Pertinent to this appeal, both defendants moved to dismiss the charges on the basis of prearrest delay, arguing that the prosecution's twelve-year delay in filing charges caused a loss of evidence prejudicial to defendants' right to a fair trial. In support of their motions, defendants relied on a stipulation of facts regarding unavailable witnesses and lost evidence.

According to the stipulation, the following witnesses are now deceased or otherwise unavailable: Philip Hatcher, an insurance agent who arranged life insurance policies making Desai and Turetzky beneficiaries upon the death of the other; Jintendra Surti, bookkeeper for Desai and Turetzky, who was the custodian of the clinic's banking records; Thomas [*131] McCrary, who negotiated a clinic check for $ 2,018 to Adams, characterized by the prosecution as [***3] the "payoff" for the homicide; Woodhaven Police Sgt. JamesJohnson, the preliminary investigator of the murder; Peter Slywka, Turetzky's father, who made reward offers for the discovery of the perpetrator; Dr. Ruth Higgins, a psychiatrist who was familiar with McCrary's psychiatric problems; Dr. Gregory Kaufman, who performed the autopsy on Turetzky; and Frank Raines, an associate of key witness Lawrence Gorski.

Certain physical evidence was also stipulated by the parties to be missing: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police; n1 an "Anarchist's Cookbook" n2 once possessed by Adams; the [**46] contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by Turetzky family members in the victim's automobile after her murder and after a search of the car by the police. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 These tapes were made in the approximate time frame of January through April 1984, allegedly in an attempt to exact

a confession from Adams and extort money from Desai [***4]

n2 This book purportedly contained underlined passages regarding strangulation techniques.

n3 According to the preliminary examination testimony of the victim's children, the initials "S A" (defendant Adams' initials) were written on this piece of tissue paper, which was turned over to the police.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

Both defendants filed motions to dismiss in the trial court, arguing that all of the missing witnesses and physical evidence were potentially exculpatory [*132] and that the twelve-year delay in filing charges prejudiced their rights to a fair trial. Following an evidentiary hearing, the trial court ruled that defendants were irreparably prejudiced and unable to present a defense given the loss of testimonial and physical evidence. The trial court further found that the prosecution intentionally delayed the investigation in order to gain a tactical advantage over defendants by waiting for an anticipated change in the law that would permit the admission of Adams' inculpatory hearsay statement against Desai. The trial court granted defendants' motions to dismiss, concluding that the prosecution's [***5] reasons for delay did not justify the undue prejudice to defendants.

II

On appeal, the prosecution argues that the trial court erred in dismissing the charges against defendants. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v McCartney*, 72 Mich. App. 580, 589; 250 N.W.2d 135 (1976). Upon review, we agree with the prosecution that, under the present circumstances, the trial court abused its discretion in granting defendants' motions to dismiss.

In *People v Bisard*, 114 Mich. App. 784; 319 N.W.2d 670

(1982), this Court reevaluated the tripartite test of prejudicial delay originally set forth in *People v Hernandez*, 15 Mich. App. 141; 170 N.W.2d 851 (1968), n4 [*133] in light of post-Hernandez developments in due process jurisprudence. The *Bisard* Court, 114 Mich. App. at 788, noted:

> Two United States Supreme Court cases decided after 1968 have addressed the problem of preindictment or prearrest delay. In *United States v Marion*, 404 U.S. 307; 92 S. Ct. 455; 30 L. Ed. 2d 468 (1971), the Court recognized that the Due Process Clause afforded only "limited" protection to those persons who have not been arrested but [***6] observed that such persons' primary protection was in the applicable statutes of limitation. The Court explained this decision further in

United States v Lovasco, 431 U.S. 783; 97 S. Ct. 2044; 52 L. Ed. 2d 752 (1977), when it established a two-part test to be used in the due process inquiry. First, the Court observed that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 U.S. 783, 790; 97 S. Ct. 2044; 52 L. Ed. 2d 752. Second, the Court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay. n5

----------Footnotes----------

n4 Pursuant to the *Hernandez* test, once a defendant demonstrated that some prejudice had occurred as a result of the delay, it was incumbent on the prosecution to show (1) an explanation for the delay, (2) that the delay was not deliberate, and (3) that no undue prejudice attached to the defendant. *Hernandez, supra* at 147. If the prosecution failed to establish any of the three prongs of the test, a due process violation was established.

n5 The *Lovasco* Court, 431 U.S. at 790-791, reasoned:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking

> indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself," *United States v Ewell, supra* [383 U.S. 116, 120; 86 S. Ct. 773; 15 L. Ed. 2d 627 (1966)].

----------End Footnotes----------

[**47] [***7]

Adopting this two-part test, the *Bisard* Court rejected an interpretation of *Lovasco* that would place [*134] an "extremely heavy burden" on a defendant by requiring that the defendant prove both actual prejudice and unexplainable delay. 114 Mich. App. at 789. Instead, the Court construed *Lovasco* in the following manner:

> We hold that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end. [431 U.S. at 791.]

See also *People v Reddish*, 181 Mich. App. 625, 627; 450 N.W.2d 16 (1989); *People v Loyer*, 169 Mich. App. 105, 118-119; 425 N.W.2d 714 (1988); *People v Shelson*, 150 Mich. App. 718, 726; 389 N.W.2d 159 (1986); *People v Dungey*, 147 Mich. App. 83, 85; 383 N.W.2d 128 [***8]

(1985); *People v Vargo*, 139 Mich. App. 573, 579; 362 N.W.2d 840 (1984); *People v Evans*, 128 Mich. App. 311, 314; 340 N.W.2d 291 (1983).

Pursuant to the requisite two-part inquiry, a defendant must initially demonstrate "actual and substantial" prejudice to his right to a fair trial. *Bisard, supra* at 790; *People v White*, 208 Mich. App. 126, 134; 527 N.W.2d 34 (1994); n6 *Dungey, supra* at 88. Accord, *Marion, supra* at 325; *United States v Rogers*, 118 F.3d 466, 474 (CA 6, 1997); *United States v Brown*, 959 F.2d 63, [*135] 66 (CA 6, 1992); *United States v Lash*, 937 F.2d 1077, 1088 (CA 6, 1991). In this context, as one federal court has explained, a defendant must show not only "actual prejudice, as opposed to mere speculative prejudice . . . but also that he show that any actual prejudice was substantial--that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Jones v Angelone*, 94 F.3d 900, 907 (CA 4, 1996). See also *Rogers, supra* at 476. This Court has reiterated that proof of "actual and substantial" prejudice requires more than generalized [***9] allegations:

> A defendant shoulders the burden of coming forward with evidence of prejudice. Until he does so, the prosecution's burden--to persuade the court that the delay was justified in the face of any resulting prejudice--is not triggered. The imperfection of a witness' memory may be exposed to the trier of fact during direct or cross-examination and may be emphasized to buttress or undermine credibility. If such absence of memory by a defendant's material witness due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay. In this case, however, no such impediment or hindrance was manifest. Moreover, we decline to accept defendant's assertion on appeal that "the

exceptionally long delay in the present case should itself raise a strong inference of prejudice." Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting [***10] to show how such unspecified prejudice was in fact justified. We [*136] will not put the cart before the horse. *[Loyer, supra* at 120]. n7

----------Footnotes----------

n6 Judge Griffin acknowledges that the test for prearrest delay articulated and applied in the instant case is more precise than the standard that he recited in *White*, 208 Mich. App. at 134-135.

n7 Delays spanning many years have been held by courts in other jurisdictions not to be presumptively prejudicial. See, e.g., *United States v Pardue*, 134 F.3d 1316 (CA 7, 1998) (ten-year delay); *United States v. McDougal*, 133 F.3d 1110 (1998)(nine-year delay); *United States v Mmahat*, 106 F.3d 89 (CA 5, 1997) (nine-year delay); *Jones, supra* (ten-year delay); *United States v Crouch*, 84 F.3d 1497 (CA 5, 1996) (seven-year delay); *Wilson v McCaughtry*, 994 F.2d 1228 (CA 7, 1993) (sixteen-year delay); *Stoner v. Graddick*, 751 F.2d 1535 (1985)(nineteen-year delay).

---------- End Footnotes----------

[**48] Although the Michigan courts have not had occasion to address the effect of the death of a material witness during an interval of prearrest [***11] delay on the continued prosecution of a case, the federal courts have consistently held, in the present context, that the death of a witness alone is insufficient to establish actual and substantial prejudice:

> The death of a potential witness during the preindictment period may demonstrate the requisite prejudice if the defendant can demonstrate that exculpatory evidence was lost and could not be obtained through other means. ... However, a defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available.
>
> Even where a defendant specifies what a deceased witness's testimony would have been, actual prejudice is difficult to prove. *[Rogers, supra* at 475.]

See also *Lovasco,* 431 U.S. at 785-786; *United States v Benshop,* 138 F.3d 1229, 1232-1234 (CA 8, 1998); *United States v Beszborn,* 21 F.3d 62, 66 (CA 5, 1994); *United States v Valona,* 834 F.2d 1334, 1338 (CA 7, 1987); *Stoner v Graddick,* 751 F.2d 1535, 1544 (CA 11, [*137] 1985); *United States v Corbin,* 734 F.2d 643, 648 (CA 11, 1984).

In the instant [***12] case, we conclude that defendants have not demonstrated the requisite actual and substantial prejudice necessary to satisfy the first prong of the *Bisard* test to thereby shift the burden of persuasion to the prosecution to show the reasonableness of the delay. Defendants have made no showing that any of these witnesses would have provided relevant information beneficial to their defense. Although defendants contend in general terms that they have been deprived of the opportunity to cross-examine the unavailable witnesses, defendants have neither specified the substance of that cross-examination testimony nor offered anything more than mere speculation concerning the exculpatory nature of such testimony. Indeed, if any party has been detrimentally affected by the unavailability of these witnesses, it is the prosecution, not defendants. The unavailable individuals were prosecution witnesses who, it is reasonable to surmise, would have provided information valuable to the

prosecution. Consequently, the prosecution must move forward without the benefit of this testimonial evidence. n8

----------Footnotes----------

n8 The issue of undue prearrest delay does not entail consideration of the strength of the prosecution's case, but rather prejudice to the defense. In this regard, we note that defendants filed motions to quash in the trial court. In light of its order dismissing the cases on the basis of prejudicial prearrest delay, the trial court did not address the merits of defendants' motions to quash.

----------End Footnotes----------

[***13]

Defendants have likewise failed to show actual and substantial prejudice by reason of the missing physical evidence. Defendants contend that the loss of the physical evidence has denied them the opportunity to [*138] conduct testing, such as fingerprint analysis, to determine whether the evidence may have been exculpatory. However, this argument, too, rests upon speculation. Defendants have not substantiated the potentially exculpatory aspects of this physical evidence, for instance, by delving into the substance of the missing tape-recorded conversations or explaining how the loss of the tissue paper and Anarchist's Cookbook, incriminatory in nature, prejudiced their defense. n9 In fact, testimony [**49] adduced during the evidentiary hearing held below indicated that the missing evidence was the prosecution's loss and defendants' gain, given that the *prosecution's* case rested in large part on this lost evidence. Defendants' vague claims of prejudice therefore fall short of the requisite proof. n10

----------Footnotes----------

n9 Defendants' reliance on *People v Dungey*, 147 Mich. App. 83; 383 N.W.2d 128 (1985), is misplaced. In *Dungey*, the defendant was not charged with criminal sexual assault until seven months after the alleged assault occurred.

Immediately after the offense, the victim underwent a physical examination, which provided secretion evidence. During the intervening delay, the evidence lost its identifying properties, thus preventing the defendant from conducting tests on the evidence. The *Dungey* Court, 147 Mich. App. at 88, ruled:

> The secretion typing tests could not prove that defendant was guilty of the act, but offered the possibility of excluding him from the class of suspects. The prosecutorial delay and neglect made it impossible to obtain the potentially exculpatory evidence, and therefore the prejudice to defendant is clear.
>
> The defendant in *Dungey* amply demonstrated that the physical properties of the missing evidence could have potentially excluded him as a suspect. The missing evidence in the instant case is potentially inculpatory, and defendants have not otherwise specified how these items may have exculpated them or meaningfully impaired the defense by their loss. [***14]

n10 Moreover, this Court has held, albeit in a different but nonetheless pertinent context, that a loss of physical evidence that occurs before a defense request for its production does not require reversal absent the intentional suppression of evidence or a showing of bad faith. *People v Johnson,* 197 Mich. App. 362, 365; 494 N.W.2d 873 (1992); *People v Albert,* 89 Mich. App. 350, 352-353; 280 N.W.2d 523 (1979). Defendants have not shown from the testimony generated during the evidentiary hearing that the police or the prosecution acted in bad faith or intentionally suppressed or destroyed the missing evidence. On the contrary, one of the original investigating officers, Sergeant James Osborn, expressly disavowed any intentional destruction of evidence.

----------End Footnotes----------

We conclude the trial court abused its [*139] discretion in granting defendants' motions to dismiss on the basis of prejudicial prearrest delay. *McCartney, supra.* Defendants' claims of prejudice are too indefinite and speculative to satisfy the threshold requirement of *Bisard, supra,* that "actual and substantial" prejudice be shown [***15] before the burden of persuasion shifts to the prosecution to justify the delay. Defendants have not carried their burden.

III

Next, even if we were to assume the existence of actual and substantial prejudice to defendants, we nonetheless conclude that the trial court clearly erred in finding that the prosecution's proffered reasons for the delay did not justify the resultant prejudice.

In the present case, an important piece of evidence for the prosecution is the alleged statement made by Adams to witness Lawrence Gorski, in which Adams confessed to killing Turetzky at the request of Desai. Before the Michigan Supreme Court's decision in *People v Poole,* 444 Mich. 151; 506 N.W.2d 505 (1993), this alleged statement could be introduced into evidence only against Adams. However, the *Poole* decision may now provide authority for the use of Adams' statement against Desai as well. The *Poole* Court held, pursuant to MRE 804(b)(3), that a declarant's inculpation of an accomplice, made in the context of a narrative [*140] of events at the declarant's initiative without prompting or inquiry, and clearly against penal interest, is admissible as substantive evidence at trial. The trial court [***16] in the instant case found that the prosecution deliberately waited for this anticipated change in the law before filing criminal charges against the defendants:

> The prosecutor's office contends that the delay in prosecution of this case was due to the ongoing investigation. This is a legitimate reason for a delay.
>
> However, a change in the law occurred permitting

> them to use Adams alleged statement against Desai as well as himself. The tactical advantage of trying both defendants together came as a result of waiting for the *Poole* decision, rather than the discovery of new evidence from an investigation. Thus, this Court finds that the prosecutor intended to wait for an anticipated change in the law, that was tactically advantageous to them in the prosecution of this case, under the guise of conducting an ongoing investigation.

We respectfully disagree and hold that this finding is clearly erroneous.

In *Lovasco*, 431 U.S. at 795-796, the United States Supreme Court opined that an investigative, as opposed to tactical, delay does not violate the Due Process Clause of the Fifth Amendment:

> In our view, investigative delay is fundamentally unlike delay undertaken by [***17] the Government solely "to gain tactical advantage over the accused," *United States v Marion*, 404 U.S. at 324 [92 S. Ct. 465; 30 L. Ed. 2d 468 (1971)] precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to [**50] seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt [*141] beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith v United States*, 360 U.S. 1, 10; 79 S. Ct. 991, 997; 3 L. Ed. 2d 1041 (1959). This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

See also *Bisard*, 114 Mich. App. at 790-791; *White*, *supra* at 134; *Brown*, *supra* at 66.

Our review of the record reveals that several factors were involved in the decision not to prosecute sooner. The testimony of then-assistant prosecutor Nancy Alberts, [***18] when read in context, is particularly telling in this regard. She testified that the *Poole* hearsay problem was but one factor in the decision not to prosecute. n11

----------Footnotes----------

n11

Q. (Defense Counsel) You earlier testified I think, and correct me if I'm wrong, that you made a decision not to prosecute at a particular time based upon the state of the law at that time regarding this penal interest exception to the hearsay rule?

A. (Alberts) That was as to Dr. Desai, yes.

Q. Okay.

A. There were other considerations. That was one of them.

Q. What were the other considerations?

A. The quality of the evidence we had.

Q. All right. Is it fair to say that you weren't satisfied that there was a prosecutable case without that statement of Gorski?

A. That was one factor--

Q. Do you recall--

A. --as against Dr. Desai.

Q. Okay. Do you recall other factors?

A. There [was] a problem with--that the case was a circumstantial one, as I remember it, although I don't remember all of the evidence, but I remember that being one problem. And another one was the--the quality of the evidence against Mr. Adams, the quality of Mr. Gorski's testimony as--and I think that's about it. It was not the--at that point it certainly was not--not as strong a case as I thought we could deal with.

Q. Okay. Was caseload a factor, your caseload?

A. No.

Q. Okay. In terms of Gorski, did you ever interview him yourself?

A. No.

Q. Do you recall one of the problems with Gorski being the fact that after he was interviewed, he was requested to take a polygraph and he didn't show up for the polygraph?

A. Yes.

* * *

Q. Okay. Your decision to not prosecute based upon the state of the law regarding the penal interest exception to the hearsay rule was made before or after you received those [grand jury] transcripts?

* * *

A. My decision to not prosecute was based on a number of factors. That decision was made after Mr.

Gorski did not take the polygraph and I don't think we did anything else after that, so if that would help you with your time frame, I believe that everything was concluded after that point.

* * *

Q. Did you at some point in time make a strategic decision or a tactical decision to not prosecute this case at a particular point in time until the law changed or became more favorable with regard to the admissibility of this conversation that had problems relating to the penal exception to the hearsay rule?

A. No.

Q. Did you ever consider that the longer that you delay in bringing or prosecuting this case, that it was going to have a detrimental effect on the ability to reconstruct facts through witnesses because memories would have been faded or evidence would have become lost?

* * *

A. As to this particular case, I mean what I--I want to be careful here because always it's a detriment that a case is old. At the time I got the case, that was going through my mind because I got the case a number of years after the murder had occurred. But in terms of whether or not I delayed, I had no intention of delaying it. To me it was a decision of whether or not I'm going to prosecute or not prosecute.

* * *

Q. As you look back on this case now, was it the ability or the wherewithal of Gorski to pass a polygraph on what he said that was pivotal in your

decision whether to prosecute this case?

A. As to whether or not to prosecute the case against Steve Adams, it was very important. I don't know, I can't speculate today as to whether or not he had passed, would I have decided to prosecute, I can't tell you that, but it definitely was very important.

Q. Was there some reason that you wanted to prosecute the doctor and Mr. Adams at the same time as opposed to one before the other?

A. Well, it's always advantageous to prosecute two defendants at once but I guess that's the only--only reason, but I didn't see any way that I could do it.

Q. Is that to say that it gives you some sort--it's advantageous, it's some sort of a strategic advantage to do it that way?

A. Sure, if you have the evidence.

Q. Why is that?

A. Well, you only have to--you only have to do the case once, basically that's it I guess, and I would think a fact finder would understand more what you're getting at if you have two people.

Q. In other words, it's easier to present the jury with all of the persons that you think are involved in the same courtroom?

A. Sure.

Q. Was delaying a factor to collect evidence to give you an opportunity to bring the case against both of them together?

A. Well, you're assuming a question that I had a goal of delaying and it definitely was not--delay was

definitely not--not a thing that I saw going in my favor at all. Delay usually goes against the prosecution, and I was never in favor of delay. And I don't remember anyone ever coming through my mind or ever being communicated to me that it should be delayed. We're trying to work as quickly as possible.

On cross-examination, Alberts reiterated that investigative concerns motivated her decision not to prosecute:

Q. (the prosecutor) If you could have, in your professional judgment, charged this case in 1988, would you?

A. Absolutely.

Q. Why didn't you?

A. I didn't think I could get past a preliminary examination.

Q. Did it concern you that on the one hand you had information, however accurate it was, that Mr. Adams had passed a polygraph?

A. Yes.

Q. Did that influence your decision on whether to proceed at all?

A. Yes.

Q. Why?

A. Because he may have been telling the truth. Frankly, from my looking at the other evidence, I really doubted the results of the polygraph, but that is powerful evidence and assuming that it was--that it was correct, I found it to be pretty strong evidence for the defense.

Q. And did--

A. A big hurdle.

Q. Were you concerned about perhaps charging an innocent man?

A. Of course.

Q. And did that weigh on your decision?

A. Sure.

Q. To your knowledge, in the time you were in the unit, was there ever a grand jury impaneled to deal with a specific case?

A. I don't think so.

Q. Did you delay this prosecution to hurt the defense?

A. I didn't delay the prosecution at all. I denied the prosecution.

----------End Footnotes----------

[***19] [**51]

[*144] Alberts' testimony clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action. n12 The investigation took many twists and turns during the years following Turetzky's murder. As noted above, key witnesses died and evidence became unavailable. In 1984, a federal grand jury convened to investigate an unrelated matter involving defendant Desai, and more evidence was allegedly garnered pertaining to this investigation. Adams and the key witness, Gorski, disappeared and were eventually located outside Michigan. Gorski failed to appear for a polygraph examination, and

[*145] Adams, who did take a polygraph, appeared to have "passed" the examination. Finally, in 1994, a one-man grand jury was appointed to investigate unsolved murders in the city of Detroit, including the murder in this case. Both defendants were subpoenaed to appear before the grand juror and, on the basis of the cumulative evidence gathered from this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky. On the record, we find no deliberate tactical delay by the prosecution and hold that the [***20] trial court clearly erred in its finding to the contrary. n13

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n12 David Hesburn and James Osborn, two of the police officers involved in the investigation during the twelve-year period, also testified during the evidentiary hearing that the investigation was never delayed to gain a tactical advantage.

n13 We further reject the underlying premise advanced by defendants and accepted by the trial court that the Wayne County Prosecutor is capable of predicting Supreme Court decisions years in advance of their issuance. Such clairvoyance would be most extraordinary.

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For these reasons, we reverse the decision of the trial court and remand these cases for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Roman S. Gribbs

/s/ Michael J. Talbot

Court of Appeals, State of Michigan

ORDER

Richard Allen Griffin
Presiding Judge
Roman S. Gribbs
Michael J. Talbot
Judges

People of MI v. Stephan Charles Adams & Jasuhubai Keshubai Desai

Docket No. 202665; 202666

LC No. 95-004495; 95-007158

The Court orders that defendants' motions for rehearing are DENIED.

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

December 29, 1998
Date

/s/ Carl L. Gromek
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: November 2, 1999

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanaugh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SC: 113921
COA: 202666

JASHUBAI KESUBAHAI DESAI,

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the October 9,1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals.

Cavanagh and Kelly, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 2, 1999 /s/ Corbin R. Davis

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: November 2, 1999

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanaugh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SC: 113904
COA: 202665
Rec Ct: 35-004495

STEPHEN CHARLES ADAMS,

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the October 9,1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals.

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November 2, 1999 /s/ Corbin R. Davis

(2)

No. 99-1471

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

IN THE
UNITED STATES SUPREME COURT

JASUBHAI K. DESAI

Petitioner

vs.

PEOPLE OF THE STATE OF MICHIGAN

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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42pp

QUESTION PRESENTED

I.

DELAY IN CHARGING VIOLATES DUE PROCESS ONLY WHERE THERE IS A DELIBERATE DELAY FOR THE PURPOSE OF DISADVANTAGING THE DEFENDANT AND ACTUAL AND SUBSTANTIAL PREJUDICE CAN BE SHOWN. THE PEOPLE DID NOT CHARGE THE DEFENDANT UNTIL THE INVESTIGATION WAS CONCLUDED AND IT WAS BELIEVED SUFFICIENT EVIDENCE TO CONVICT EXISTED. IN THE ABSENCE OF A SHOWING OF BAD FAITH AND ACTUAL AND SUBSTANTIAL PREJUDICE CAN THERE BE A DUE PROCESS VIOLATION?

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OPINIONS AND ORDERS OF LOWER COURTS

On March 21, 1997, Judge Karen Fort-Hood of the Wayne County Circuit Court (formerly Recorder's Court) issued a written Opinion and Order granting the Motions to dismiss filed by Co-Defendants Desai and Adams. (Defendant's App. Opinion and Order of Trial Court 3/21/97) On October 9, 1998 the court of Appeals issued an Opinion and Order reversing the Trial Court dismissal and remanding the case for further proceedings consistent with its opinion. (Opinion in full is Statement of Case). This opinion is not included in the petition. *People v Adams*, 232 Mich App 128 (1999)

On December 29, 1998 Defendant's Motion for Rehearing was denied by the Court of Appeals. On September 2, 1999 the Michigan Supreme Court denied Defendant's application for leave to appeal.

STATEMENT OF CASE

Defendant was charged twelve years after the murder of the victim, Turetzky. Initially, the Murder was considered unsolved, but a federal grand jury investigation into medical malpractice turned up evidence of Defendant's involvement. This evidence was presented to the police five years after the murder. The police re-opened the murder investigation. Meanwhile, Michigan law changed allowing statements against penal interest to be used as substantive evidence under certain circumstances showing sufficient reliability of the statement. The investigation continued by the convening of a state "one person" (a judge, by state law) investigative grand jury, resulting in the issuance of an indictment when the grand juror determined there was sufficient evidence for indictment.

Petitioner has failed to comply with Rule 14.1(i) which requires that opinions of the courts be included in the appendix. While petitioner notes the twelve page, October 9, 1998 Court of Appeals opinion reversing the trial court dismissal and reinstating the charges is the basis for jurisdiction, Petitioner failed to include this opinion in his appendix.

It is from this opinion which the petition seeks relief. The People therefore include the Court of Appeals Opinion as the Statement of the Case.

COURT OF APPEALS OPINION

Defendants were charged in 1995 with the November 3, 1983, strangulation murder of Anna Marie Turetzky in Woodhaven, Michigan. Turetzky, defendant Desai's business partner in the operation of a medical clinic, was found dead in her automobile parked behind a local motel. Desai had allegedly solicited defendant Adams to commit the murder. Following separate preliminary examinations, defendants were bound over and their cases consolidated for trial. Pertinent to this appeal, both defendants moved to dismiss the charges on the basis of prearrest delay, arguing that the prosecution's twelve-year delay in filing charges caused a loss of evidence prejudicial to defendants' right to a fair trial. In support of their motions, defendants relied upon a stipulation of facts regarding unavailable Witnesses and lost evidence.

According to the stipulation, the following witnesses are now deceased or otherwise unavailable: Philip Hatcher, an insurance agent who arranged life insurance policies making Desai and Turetzky beneficiaries upon the death of the other, Jintendra Surti, bookkeeper for Desai and Turetzky, who was the custodian of the clinic's banking records;

Thomas McCrary, who negotiated a clinic check for $2,018 to Adams, characterized by the prosecution as the "payoff" for the homicide; Woodhaven Police Sgt. James Johnson, the preliminary investigator of the murder; Peter Slywka, Turetzky's father, who made reward offers for the discovery of the perpetrator; Dr. Ruth Higgins, a psychiatrist who was familiar with McCrary's psychiatric problems; Dr. Gregory Kaufman, who performed the autopsy on Turetzky; and Frank Raines, an associate of key witness Lawrence Gorski.

Certain physical evidence was also stipulated by the parties to be missing: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police;[1] an "Anarchist's Cookbook"[2] once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by Turetzky family members in the victim's automobile after her murder and after a search of the car by the police.[3]

Both defendants filed motions to dismiss in the trial court, arguing

that all of the missing witnesses and physical evidence were potentially exculpatory and that the twelve-year delay in filing charges prejudiced their rights to a fair trial. Following an evidentiary hearing, the trial court ruled that defendants were irreparably prejudiced and unable to present a defense given the loss of testimonial and physical evidence. The trial court further found that the prosecution intentionally delayed the investigation in order to gain a tactical advantage over defendants by waiting for an anticipated change in the law that would permit the admission of Adams' inculpatory hearsay statement against Desai. The trial court granted defendants' motions to dismiss, concluding that the prosecution's reasons for delay did not justify the undue prejudice to defendants.

II

On appeal, the prosecution argues that the trial court erred in dismissing the charges against defendants. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Cartney,* 72 Mich App *580,589; 250* NW2d 135(1976). Upon review we agree with the prosecution that, under the present circumstances, the trial court abused its discretion in granting defendants'

motions to dismiss.

In People v Bisard, 114 Mich App 784; 319 NW2d 670 (1982), this Court reevaluated the tripartite test of prejudicial delay originally set forth in *People v Hernandez, 15* Mich App 141; 170 NW2d 351 (1968),' in light of post-Hernandez developments in due process jurisprudence. The *Bisard* Court, *supra at* 788, noted:

> Two United States Supreme Court cases decided after 1968 have addressed the problem of preindictment or prearrest delay. In *United States* V *Marion,* 404 US 307; 92S Ct 455; 30 L Ed 2d 468(1971), the Court recognized that the Due Process Clause afforded only "limited" protection to those persons who have not been arrested but observed that such persons' primary protection was in the applicable statutes of limitation. The Court explained this decision further in *United States V Lovasco,* 431 US 783; 97 S Ct 2044; 52 L Ed 2d *752* (1977), when it established a two-part test to be used in the due process inquiry. First, the Court observed that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 US 783, 790. Second, the Court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay.

Adopting this two-part test, the *Bisard* Court rejected an

interpretation *of Lovasco* that would place an "extremely heavy burden" on a defendant by requiring that the defendant prove both actual prejudice and unexplainable delay *Id* at 789. Instead, the Court construed *Lovasco* in the following manner:

> W]e hold that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end. *[Id.* at 791.

Sec also, *People v Reddish,* 181 Mich App 625,627; 450 NW2d 16(1989); *People v Loyer,* 1NW2d *159(1986);People v Dungey,* 147 Mich App 83,85; 383 NW2d 128(1985); *People v Vargo,* 139 Mich App 573, 579; 362 NW2d 840(1984); *People V Evans,* 128 Mich App 311, 314; 340 NW2d291 (1983).

Pursuant to the requisite two-part inquiry, a defendant must initially demonstrate "actual and substantial" prejudice to his right to a fair trial. *Bisard supra* at 790; *People v White,* 208 Mich App 126, 134; 527 NW2d 34 (1994)6; *Dungey; supra* at 88. Accord, *Marion, supra* 404 US

at 325; *United States v Rogers*, 118 F3d 466,474 (CA 6, 1997); *United States v Dawn*, 959 F2d 63,66 (CA 6, 1992); *United States v Lash*, 937 F2d 1077, 1088 (CA 6, 1991). In this context, as one federal court has explained, a defendant must show not only "actual prejudice, as opposed to mere speculative prejudice. .. but also that he show that any actual prejudice was substantial -- that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected."See also *Rogers, supra* at 476. This Court has reiterated that proof of "actual and substantial" prejudice requires more than generalized allegations.

> A defendant shoulders the burden of coming forward with evidence of prejudice. Until he does so, the prosecution's burden -- to persuade the court that the delay was justified in the face of any resulting prejudice -- is not triggered. The imperfection of a witness' memory may be exposed to the trier of fact during direct or cross-examination and may be emphasized to buttress or undermine credibility. If such absence of memory by a defendant's material witness due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay. In this case, however, no such impediment or hindrance was manifest. Moreover, we decline to accept defendant's assertion on appeal that "the exceptionally long delay in the present case should itself

> raise a strong inference of prejudice." Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified. We will not put the cart before the horse. [Loyer, *supra* at 120].

Although the Michigan courts have not had occasion to address the impact that the death of a material witness during an interval of prearrest delay has on the continued prosecution of a case, the federal courts have consistently held, in the present context, that the death of a witness alone is insufficient to establish actual arid substantial prejudice:

> The death of a potential witness during the preindictment period may demonstrate the requisite prejudice if the defendant can demonstrate that exculpatory evidence was lost and could not be obtained through other means. . However, a defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available.

Even where a defendant specifies what a deceased witness's testimony would have been, actual prejudice is difficult to prove. *(Rogers, supra* at 475.3.

See also, *Lovasco, supra* at 431 US at *735-786; United States v Benshop,* 138 F3d 1229, 1232-1234 (CA 8, 1998); *United States v Beszborn,* 2t F3d 62, 66 (CA 5, 1994); *United States* v*Valona,* 834 F2d 1334, 1338 (CA 7, 1987); *Stoner* v *Graddick,* 751 F2d *1535,* 1544 (CA Il, 1985); *United States* v *Corbin, 734* F2d 643, 648 (CA 11, 1984).

In the instant case, we conclude that defendants have not demonstrated the requisite actual and substantial prejudice necessary to satisfy the first prong of the *Bisard* test and thereby shift the burden of persuasion to the prosecution to show the reasonableness of the delay. Defendants have made no showing that any of these witnesses would have provided relevant information beneficial to the defense of their cases. Although defendants contend in general terms that they have been deprived of the opportunity to cross-examine the unavailable witnesses, defendants have neither specified the substance of that cross-examination testimony nor offered anything more than mere speculation concerning the exculpatory nature of such testimony. Indeed, if any party has been

detrimentally affected by the unavailability of these witnesses, it is the prosecution, not defendants. The unavailable individuals were prosecution witnesses who, it is reasonable to surmise, would have provided information valuable to the prosecution. Consequently, the prosecution must move forward without the benefit of this testimonial evidence.

Defendants have likewise failed to show actual and substantial prejudice by reason of the missing physical evidence. Defendants contend that the loss of the physical evidence has denied them the opportunity to conduct testing, such as fingerprint analysis, to determine whether the evidence may have been exculpatory. However, this argument, too, rests upon speculation. Defendants have not substantiated the potentially exculpatory aspects of this physical evidence, for instance, by delving into the substance of the missing tape-recorded conversations or explaining how the loss of the tissue paper and Anarchist's Cookbook, incriminatory in nature, prejudiced their defense.[9] In fact, testimony adduced at the evidentiary hearing held below indicated that the missing evidence was the prosecution's loss and defendants' gain, given that the *prosecution* 's case rested in large part upon this lost evidence Defendants' vague claims

of prejudice therefore fall short of the requisite proof. 10

We conclude the trial court abused its discretion in granting defendants' motions to dismiss on the basis of prejudicial prearrest delay. *McCartney, supra.* Defendants' claims of prejudice are too indefinite and speculative to satisfy the threshold requirement *of Bisard, supra,* that "actual and substantial" prejudice be shown before the burden of persuasion shifts to the prosecution to justify the delay. Defendants have not carried their burden.

III

Next, even if we were to assume the existence of actual and substantial prejudice to defendants, we nonetheless conclude that the trial court clearly erred by finding that the prosecution's proffered reasons for the delay did not justify the resultant prejudice.

In the present case, an important piece of evidence for the prosecution is the alleged statement made by Adams to witness Lawrence Gorski, in which Adams confessed to killing Turetzky at the request of Desai. Prior to the Michigan Supreme Court's decision in *People v Poole,* 444 Mich 151; 506 NW2d *505* (1993), this alleged statement could only

be introduced into evidence against Adams. However, the *Poole* decision may now provide authority for the use of Adams' statement against Desai as well. The *Poole* Court held, pursuant to MRE 804(b)(3), that a declarant's inculpation of an accomplice, made in the context of a narrative of events at the declarant's initiative without prompting or inquiry, and clearly against penal interest, is admissible as substantive evidence at trial. The trial court in the instant case found that the prosecution deliberately waited for this anticipated change in the law before filing criminal charges against the defendants:

> T]he prosecutor's office contends that the delay in prosecution of this case was due to the ongoing investigation. This is a legitimate reason for a delay
>
> However, a change in the law occurred permitting them to use Adams' alleged statement against Desai as well as himself The tactical advantage of trying both defendants together came as a result of waiting for the *Poole* decision, rather than the discovery of new evidence from an investigation. Thus, this Court finds that the prosecutor intended to Wait for an anticipated change in the law, that was tactically advantageous to them in the prosecution of this case, under the guise of conducting an ongoing investigation.

We respectfully disagree and hold that this finding is clearly

erroneous.

In *Lovasco, supra* at 431 US at 795-796, the United States Supreme Court opined that an investigative, as opposed to tactical, delay does not violate the Due Process Clause of the Fifth Amendment:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v Marion,* 404 US at 324; 92 S Ct at *465,* precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith vUnitedStates,360U5* 1, 10;79SCt991,997;3LEd2d *1041(1959).* This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

See also, *Bisard, supra* at 790-791; *White, supra* at 134; *Drown, supra* at 66.

Our review of the record reveals that several factors were involved in the decision not to prosecute at an earlier point in time. The testimony of then-assistant prosecutor Nancy Alberts, when read in context, is particularly telling in this regard. She testified that the *Poole* hearsay problem was but one factor in the decision not to prosecute.

Alberts' testimony clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action.[12] The investigation took many twists and turns during the years following Turetzky's murder. As noted above, key witnesses died and evidence became unavailable. In 1984, a federal grand jury convened to investigate an unrelated matter involving defendant Desai, and more evidence was allegedly garnered pertaining to this investigation. Adams and the key witness, Gorski, disappeared and were eventually located outside of Michigan. Gorski failed to appear for a polygraph examination, and Adams, who did take a polygraph, appeared to have "passed" the examination. Finally, in 1994, a one-man grand jury was appointed to investigate unsolved murders within the City of Detroit, including the murder in this case. Both defendants were subpoenaed to appear before the

grand juror and, based on the cumulative evidence gathered from this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky On the record, we find no deliberate tactical delay by the prosecution and hold that the trial court clearly erred in its finding to the contrary.[3]

For these reasons, we reverse the decision of the trial court and remand these cases for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

1. These tapes were made in the approximate time frame of January through April 1984, allegedly
in an attempt to exact a confession from Adams and extort Desai.
2. This book purportedly contained underlined passages regarding strangulation techniques.
3. According to the preliminary examination testimony of the victim's children, the initials "S A"
(defendant Adams' initials) were written on this piece of tissue paper, which was turned over to the
police.
4. Pursuant to the *Hernandez* test, once a defendant demonstrated that some prejudice had occurred
as a result of the delay, it was incumbent on the prosecution to show (1) an explanation for the delay,

(2) that the delay was not deliberate, and (3) that no undue prejudice attached to the defendant.

Hernandez, supra at 147. If the prosecution failed to establish any of the three prongs of the test, a due process violation was established.

5 The *Lovasco* Court, *supra* at 431 US at 790-791, reasoned:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself," *United States v Ewell, supra,* 383 US [116] at 120; 86 5 Ct [773] at 776; [15 L Ed 2d 627 (1966)].

6. Judge Griffin acknowledges that the test for prearrest delay articulated and applied in the instant case is more precise than the standard that he recited in *White, supra* at 134-135.

Delays spanning many years have been held by courts in other jurisdictions not to be presumptively prejudicial. See, e.g., *United States v Pardue,* 134 F3d 1316 (CA7, 1998) (ten-year delay); *McDougal, supra* (nine-year delay); *United States* v , 106 F3d 89 (CA 5, 1997) (nine-year delay); *Jones. supra* (ten-year delay); *United States v Crouch,* 84 F3d 1497 (CA, 1996) (seven-year delay); *Wilson v McNaughty,* 994 F2d 1228 (CA 7, 1993) (sixteen-year delay); *Stone; supra* (nineteen-year delay).

The issue of undue prearrest delay does not entail consideration of the strength of the prosecution's case, but rather prejudice to the defense. In

this regard, we note that defendants filed motions to quash in the trial court. In lieu of its order dismissing the cases on the basis of prejudicial prearrest delay, the trial court did not address the merits of defendants' motions to quash.

7. Defendants' reliance on *People* v *Dungey,* 147 Mich App 83; 383 NW2d 128 (1985), is misplaced. In *Dungey,* the defendant was not charged with criminal sexual assault until seven months after the alleged assault occurred. Immediately after the offense, the victim underwent a physical examination, which provided secretion evidence. During the intervening delay, the evidence lost its identifying properties, thus preventing the defendant from conducting tests on the evidence. The *Dungey* Court, *supra* at 88, ruled that

> The Secretion typing tests could not prove that defendant was guilty of the act, but offered the possibility of excluding him from the class of suspects. The prosecutorial delay and neglect made it impossible to obtain the potentially exculpatory evidence, and therefore the prejudice to defendant is clear

The defendant in *Dungey* amply demonstrated that the physical properties of the missing evidence could have potentially excluded him as a suspect. The missing evidence in the instant case is potentially inculpatory, and defendants have not otherwise specified how these items may have exculpated them or meaningfully impaired the defense by their loss.

8. Moreover, this Court has held, albeit in a different but nonetheless pertinent context, that a loss of physical evidence that occurs before a defense request for its production does not require reversal absent the intentional suppression of evidence or a showing of bad faith. *People* V *Johnson,* 197 Mich App 362,365; 494NW2d 873(1992); *People v Albert,* 89 Mich App *350,352-353;* 280NW2d *523* (1979). Defendants have not succeeded in showing, based on the testimony generated at the evidentiary hearing, that the police or the prosecution acted in bad faith or intentionally suppressed or destroyed the missing evidence. On the contrary, one of the original investigating officers, Sergeant Osborn, expressly disavowed any intentional destruction of evidence.

II.

Q. *(Defense Counsel)* You earlier testified I think, and correct me if I'm wrong, that you made a decision not to prosecute at a particular time based upon the state of the law at that time regarding this penal interest exception to the hearsay rule?

A (Alberts) That was as to Dr. Desai, yes.

Q. Okay.

A. There were other considerations. That was one of them.

Q. What were the other considerations?

A. The quality of the evidence we had.

Q. All right. Is it fair to say that you weren't satisfied that there was a prosecutable case without that statement of Gorski?

A. That was one factor --

Q. Do you recall --

A. -- as against Dr. Desai.

Q. Okay. Do you recall other factors?

A. There were a problem with -- that the case was a circumstantial one, as I remember it although I don't remember all of the evidence, but I remember that being one problem. And another one was the the quality of the evidence against Adams, the quality of Mr. Gorski's testimony as - and I think that's about it. It was not the -- at that point it certainly was not -- not as strong a case as I thought we could deal with.

Q. Okay. Was caseload a factor, your caseload?

A. No.

Q. Okay. In terms of Gorski, did you ever interview him yourself?

A. No.

Q. Do you recall one of the problems with Gorski being the fact that after he was interviewed, he was requested to take a polygraph and he didn't show up for the polygraph?

A. Yes.

Q. Okay. Your decision to not prosecute based upon the state of the law regarding the penal interest exception to the hearsay rule was made before or after you received those [grand jury] transcripts?

A. My decision to not prosecute was based on a number of factors. That decision was made after Mr. Gorski did not take the polygraph and I don't think we did anything else after that, so if that would help you with you time frame, I believe that everything was concluded after that point.

Q. Did you at Some point in time make a strategic decision or a tactical decision to not prosecute this case at a particular point in time until the law changed or became more favorable with regard to the admissibility of this conversation that had problems relating to the penal exception to the hearsay rule?

A. No.

Q. Did you ever consider that the longer that you delay in bringing or prosecuting this case, that it was going to have a detrimental effect on the ability to reconstruct facts through witnesses because memories would have been faded or evidence would have become lost?

A. As to this particular case, I mean what I - I want to be careful here because always it's a detriment that a case is old. At the time I got the case, that was going through my mind because I got the case a number of years after the murder had occurred. But in terms of whether or not I delayed, I had no intention of delaying it. To me it was a decision of whether or not I'm going to prosecute or not prosecute.

Q. As you look back on this case now, was it the ability or the wherewithal of Gorski to pass a polygraph on what he said that was pivotal in your decision whether to prosecute this case?

A. As to whether or not to prosecute the case against Steve Adams, it was very important. I don't know, I can't speculate today as to whether or not he had passed, would I have decided to prosecute, I can't tell you that, but it definitely was very important.

Q. Was there some reason that you wanted to prosecute the doctor and Mr. Adams at the same time as opposed to one before the other?

A. Well, it's always advantageous to prosecute two defendants at once but I guess that's the only reason, but I didn't see any way that I could do it.

Q. Is that to say that it gives you some sort - it's advantageous, it's some sort of a strategic advantage to do it that way?

A. Sure, if you have the evidence.

Q. Why is that?

A. Well, you only have to - you only have to do the case once, basically that's it I guess, and I would think a fact finder would understand more what you're getting at if you have two people.

Q. In other words, it's easier to present the jury with all of the persons that you think are involved in the same courtroom?

A. Sure.

Q. Was delaying a factor to collect evidence to give you an opportunity to bring the case against both of them together?

A. Well, you're assuming a question that I had a goal of delaying and it definitely was not - delay was definitely not - not a thing that I saw going in my favor at all. Delay usually goes against the prosecution, and I was never in favor of delay. And I don't remember anyone ever coming through 'fly mind or ever being communicated to me that it should be delayed. We're trying to work as quickly as possible. On cross-examination, Alberts reiterated that investigative concerns motivated her decision not to prosecute:

> Q. *(the Prosecutor,)* If you could have, in you professional judgment, charged this case in 1986, would you?
>
> *A.* Absolutely.
>
> Q. Why didn't you?
>
> *A.* I didn't think I could get past a preliminary examination.
>
> Did it concern you that on the one hand you had information, however accurate it was, that Mr. Adams had passed a polygraph?
>
> *A.* Yes.

Q. Did that influence your decision on whether to proceed at all?

A. Yes.

Q. Why?

A. Because he may have been telling the truth. Frankly, from my looking at the other evidence, I really doubted the results of the polygraph, but that is powerful evidence and assuming that it was - that it was correct, I found it to be pretty strong evidence for the defense

Q. And did -

A. A big hurdle.

Q. Were you concerned about perhaps charging an innocent man?

A. Of course.

Q. And did that weigh on voir decision?

A. Sure.

Q. To your knowledge, in the time you were in the unit, was there ever a grand jury impaneled to deal with a specific case?

A. I don't think so.

Q. Did you delay this prosecution to hurt the defense?

A. I didn't delay the prosecution at all. I denied the prosecution.

12. David Hesburn and James Osborn, two of the police officers involved in the investigation during the twelve-year period, also testified at the evidentiary hearing that the investigation was never delayed to gain a tactical advantage.

We further reject the underlying premise advanced by defendants and accepted by the trial court that the Wayne County Prosecutor is capable of predicting Supreme Court decisions years in advance of their issuance. Such clairvoyance would be most extraordinary.

REASON FOR DENYING THIS PETITION

Anna Marie Turetzky, Defendant's business partner in the operation of a medical clinic, , was found strangled in her automobile parked behind a motel on November 3, 1983. Defendant and co-defendant, Stephan Adams, also an employee at the clinic, were charged in 1995. Adams admitted in a statement that Defendant had solicited him to commit the murder. The prosecution's theory thus is that Defendant had hired Adams to murder Turetzky, his business partner, so he could collect the proceeds of the life insurance policy. The two key prosecution witnesses were Lawrence Gorski and Turetzky's daughter, Kathleen Ann Caurdy. Also essential to the prosecution's case was co-defendant, Adam's admission that Defendant hired him to commit the murder. Prior to trial, both defendants moved to dismiss the charges based upon due process prearrest delay, arguing the prosecution's twelve year delay in filing charges was deliberate to gain tactical advantage and caused a loss of evidence prejudicial to the defendant's right to a fair trial. But the "tactical advantage" claimed was not harm to the defense in the presentation of its case, but simply the change in the Michigan evidence law which occurred during the investigation and would allow Adam's statement to be used against Defendant on a proper showing of reliability.

Defendant based his due process claim upon stipulation of facts regarding unavailable witnesses and lost evidence. The trial court found deliberate delay occurred to "disadvantage" the defendant because the People admitted that one of the reasons for charging Defendant at the conclusion of the grand jury investigation was that Adam's statement could now be used as substantive evidence against Defendant.[1] The Michigan Court of Appeals found the trial court clearly erred and that the People properly charged the defendant at the conclusion of the investigation. Petitioner suggests this Court should use this case to re-define the role of Due Process with delays in arrest. This role is set forth in *United States v Lovasco,*[2] and federal courts throughout the nation

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1The essential portions of the testimony are plresented in the Court of Appeals Opinion

2*United States v Lovasco*, 431 US 783, 97 S Ct 2044__LEd2d__(1977)

hold that due process is only offended by a delay in charging where that delay was deliberate for the purpose of disadvantaging the defendant in the presentation of his or her defense, resulting in substantial prejudice to the defense in the presentation of the defense.[3]

A . The delay was not deliberately done to disadvantage the Defendant

Turetzky's murder was unsolved. Yet, a series of events caused the case to be reopened and reinvestigated:

- In 1984 a federal grand jury investigating medicare fraud called witness Lawrence Gorski, an associate of Defendant. Gorski revealed that he heard Adams admit he committed the murder of Turetzky at the request of Defendant. This information, however, was not released by the federal grand jury until July of 1988

- Based on this information the police re-opened their investigation of the Turetzky and located Gorski in October of 1988. Gorski, living in Phoenix, Arizona or Denver, Colorado agreed to fly to Detroit to take a polygraph, but did not appear. The police did locate Gorski and Gorski made a statement implicating himself and Defendant in 1989

- In June, 1994 a one person grand jury was convened to investigate unsolved murders in Detroit. Both defendants had the opportunity to present evidence to the grand jury. Based upon the results of the grand juror's investigation both defendants were separately indicted for the Turetzky murder. A preliminary examination was held and both defendants were bound over for trial.

3Indeed, Michigan currently has not quite got the test right in that it is more generous than required by due process by engaging in a balancing analysis. Federal cases require that the defense show both "prongs" of the test-there is no balancing. See e.g. *United States v Hoo*, 825 F2d 667 (CA 2, 1987): *United States v Ismail*, 828 F2d 153 (CA 3, 1987); *United States v Mmahat*, 106 F3d 89 (CA 5, 1997), among a host of cases.

- It should also be noted that in 1993 the Michigan Supreme court issued a decision which would allow a statement which is against the maker's penal interest to be used in trial against another co-perpetrator, on a proper showing of reliability.[4] This new rule would allow Adam's statement to be used against the defendant. The Prosecutor admitted that the change in the law was one of the reasons she decided to charge the Defendant as Adam's statement definitely made the murder case against Defendant stronger.

The trial court, addressing a motion to dismiss by Defendant, focused on the change in the law and found the prosecution intentionally delayed the investigation in order to gain a tactical advantage by waiting for an anticipated change in the law that would permit the admission of Adam's statement against the Defendant. Thus, the trial court found prong one was met simply because the People anticipated a change in the law while continuing the investigation. This ruling was reversed by the Michigan Court of Appeals, which relied upon *Lovasco*. The Michigan Court of Appeals ruled that an investigative delay, as opposed to a tactical delay designed not to enhance the prosecution but to harm the

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4*People v Poole*, 444 Mich 51 (1993)

defense's ability to present its case, does not violate the Due Process Clause of the Fifth Amendment. The Court concluded that the prosecutor's testimony "...clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action." And that the "...based upon the cumulative evidence gathered rom this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky." Thus the Michigan Court of Appeals correctly found no deliberate, tactical delay by the prosecution and held the trial court clearly erred in its finding to the contrary.

The mere fact that a change of law occurred during the time of investigation that strengthened the People's case does not mean that there was deliberate delay by the prosecution to gain tactical advantage by disadvantaging the defense in the presentation of its case. The law changed in 1993 and the investigation was not concluded until 1994 when the one man grand jury was appointed and a grand jury investigation into the Turetzky murder took place. The prosecution properly charged defendant at the conclusion of the grand jury investigation.

B. Investigative delay does not deprive defendant of due process, even if his defense might have been somewhat prejudiced by he lapse of time.

Since both prongs--purposeful, bad-faith delay and prejudice--must be shown to make a prima facie claim of a due process violation, the analysis need not go further as the first prong cannot be met. Nonetheless, Defendant's claim of prejudice is essentially that he had gotten away with this murder until the prosecution re-investigated the case and was able to make a case against him.

As stipulated by the parties the following witnesses were either deceased or unavailable at the time of trial: *Philip Hatcher*, an insurance agent who arranged life insurance policies making Defendant and Turetzky beneficiaries upon the death of the other; *Jintendra Surti* bookkeeper for Defendant and Turetzky, who was the custodian of the clinic's banking records; *Thomas McCrary*, who negotiated a clinic check for $2,018 to Adams, characterized by the prosecution as the "payoff" for the homicide; *Woodhaven Police Sgt. James Johnson*, the initial investigator of the murder; *Peter Slywka*, Turetsky's father, who made reward offers for the discovery of the perpetrator; *Dr. Ruth Higgins*, a psychiatrist who was familiar with McCrary's psychiatric problems; *Dr Gregory Kaufman*, who performed the autopsy on Turetzky; and *Frank Raines*, an associate of key witness Lawrence Gorski.

Missing physical evidence was also stipulated to by the parties: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police; an "Anarchist's Cookbook" once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by a Turetzky family member in the victim's automobile after her murder and after a search of the car by the police.

Defendant's claims of prejudice which he attaches to these witnesses is wholly speculative. One could as readily speculate that the witnesses would be helpful to the prosecution and harmful to the defense. The speculation as to the testimony of these witnesses is more likely to be helpful to the prosecution:

- *Phillip Hatcher*, the insurance agent who made the policy making Defendant the beneficiary upon Turetzky's death, would have testified as to who initiated the life insurance policy and how Defendant came to be the beneficiary.

- *Jinendra Surti,* the bookkeeper for the medical clinic, could have testified to the financial condition of the clinic, the relationship between defendant and Turetzky, and any irregularities in the records of the clinic which could have been evidence of motive for the murder.

Thomas McCrary, negotiated the payoff check to Adams for committing the murder and could have testified to the irregularity in issuing this check and verify that the check was not for any "known" work done by Adams at the clinic

- *Sgt James Johnson*, the primary investigator of the murder in 1983-1984, could have supplemented the evidence available at time of indictment and trial as he had a large amount of physical evidence which might have been available and could have strengthened the People's case.
- *Peter Slywka,* had offered an award for the identity of the murderer of his daughter, Turetzky and most likely would have accumulated tips and other information which would have strengthened the People's case.

Dr. Gregory Kaufman, possibly could have elaborated on his medical findings when performing the medical examination, but more likely, his testimony would have been the same as the medical examiner who testified as a murder twelve years old might not stand out.

- *Dr Ruth Higgins,* employee at the V.A. Hospital, might have testified that McCrary was incapable of committing the murder as she might have an opinion regarding his psychiatric problems.
- *Michael Baran* could have testified why he and Caurdy came to believe the Defendant arranged Turetzky's murder. They clearly knew that both Adams and Defendant were involved and they wanted to collect the $150,000 reward money.
- *Sandy Kowalski,* friend of Sidhu, who knew Turetzki, and a resident of the motel and near where Turetzki's body was found and who at best would know nothing.
- *Jack Esper*, friend of Gorski, and it would be difficult to know what his speculative testimony would be.

The Michigan Court of Appeals recognized in it opinion that the prosecution was more likely affected by the unavailability of these witnesses as the case had to be made without the benefit of their testimony.

Defendant's argument regarding the missing physical evidence is equally speculative. This missing evidence was certainly not exculpatory. The recorded conversations regarding the murder which were recorded in order to extort Defendant, more than likely contained incriminating statements The Anarchist's Cookbook describing types of strangulation found in Adam's car and the missing tissue paper with Adam's initial would suggest Adam's statement was the truth, that he killed Turetzky at Defendant's request and would enhance the People's case.

The delay here might actually benefit defendant at trial, then, because the deceased witnesses, the missing witnesses and the physical evidence would strengthen the People's case. Moreover, actual prejudice as a result of preindictment delay does not make the claim automatically valid. The prosecution is not under a duty to file charges as soon as probable cause exists and should not be penalized when they defer an

action until completely satisfied that the charge should be filed.[5] A defendant must show not only "actual prejudice, as opposed to mere speculative prejudice...but also that he show that any actual prejudice was substantial–that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected."[6] Even if defendant specifies what the witnesses testimony would have been, actual prejudice is difficult to prove.[7]

Defendant has failed to demonstrate actual and substantial prejudice which would have affected the outcome of the trial. The missing evidence and witnesses in all likelihood would have strengthened the People's case and made the conviction much more likely.

5Lovasco, supra at 759

6Jones v Angelone, 94 F3d 900, 907 (CA 4, 1996). See also *United States v Rogers*, 118 F3d 466, 476 (CA 6, 1991)

7Rogers, supra at 475

Conclusion

Defendant's petition for Certiorari should be denied as defendant has failed to show a deliberate delay to gain tactical advantage by harming the ability of the defense to present its case. He has also failed to show actual and substantial prejudice which would have affected the outcome of the trial, evidence would have made an acquittal likely.

RELIEF

WHEREFORE, the People submit this petition for writ of certiorari should be denied as defendant has failed to present evidence of bad faith conduct by the prosecution designed to prejudice the defendant and/or actual and substantial prejudice.

Respectfully submitted,

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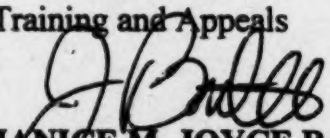

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